Teamsters Local 75, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America[1] (Schreiber Foods) *and* Sherry Lee Pirlott and David E. Pirlott. Case 30–CB–3077

January 26, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

Introduction

On December 12, 2001, Administrative Law Judge Joel P. Biblowitz issued the attached supplemental decision. The National Labor Relations Board previously issued a decision in this case[2] disposing of several 8(b)(1)(A) allegations against the Respondent, and remanding certain other allegations to the judge for further consideration. As explained below, the judge issued a supplemental decision on remand, recommending that the remaining complaint allegations be dismissed. The Charging Parties filed exceptions, the Respondent filed cross-exceptions, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's supplemental decision and the record in light of the exceptions, cross-exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this supplemental decision and Order.

As discussed below, the Board unanimously affirms the judge's decision to the extent it holds that under the facts of this case the Union did not unlawfully charge the Charging Party objectors for expenses incurred in organizing employees working in the public sector. A panel majority (Chairman Battista and Member Schaumber, with Member Liebman in dissent) reverses the judge's finding that the Respondent did not violate Section 8(b)(1)(A) and its duty of fair representation by charging the Charging Parties for expenses incurred organizing the employees of other employers within the dairy and cheese processing industry, which is the competitive market of Schreiber Foods, the Charging Parties' employer.[3]

I. BACKGROUND

The Charging Parties in this case are bargaining unit employees who are nonmembers of the Respondent and who filed objections under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to paying for union activities not germane to the Respondent's duties as a bargaining agent. In its original decision, the Board resolved several issues arising from the Board's seminal decisions in *California Saw & Knife Works*[4] and *Weyerhaeuser Paper*,[5] in which the Board set forth the standards to be applied to protecting the rights of employees under the Supreme Court decisions in *NLRB v. General Motors*[6] and *Communications Workers v. Beck*.[7] The Board, in relevant part, remanded to the administrative law judge issues related to the chargeability of the Respondent's extra-unit expenditures for consideration in light of the Board's decision in *California Saw*.[8] In *California Saw*, which issued after the judge's decision, the Board rejected the General Counsel's position in that case—which mirrored the General Counsel's original position in this case—that "objecting nonmembers may lawfully be charged *only* for those expenses incurred in the performance of representational activities in the objector's individual bargaining unit." 320 NLRB at 237 (emphasis added). The Board instead adopted a case-by-case approach to determining whether extra-unit expenditures are germane to collective bargaining and inure to the benefit of the objector's unit. Id. at 239.

This proceeding involves two remanded issues: whether the Respondent unlawfully charged bargaining unit employees of Schreiber Foods who had filed *Beck* objections (the Charging Parties or objectors) for ex-

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] 329 NLRB 28 (1999).

[3] In his partial dissent, Member Schaumber would additionally reverse *Meijer*. For the reasons set forth in fn. 21, Chairman Battista finds it unnecessary to do so in the circumstances of this case. Member Liebman, in her partial dissent, agrees with Chairman Battista that it is unnecessary to revisit *Meijer* here. She also maintains, however, that *Meijer* was correctly decided.

[4] 320 NLRB 224 (1995), enf. sub. nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

[5] *Paperworkers Local 1033 (Weyerhaeuser Paper Co.),* 320 NLRB 349 (1995), revd. on other grounds sub nom. *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), vacated sub nom. *Paperworkers Local 1033 v. Buzenius,* 525 U.S. 979 (1998).

[6] 373 U.S. 734 (1963).

[7] 487 U.S. 735 (1988).

[8] Applying *California Saw*, the Board adopted the judge's finding that the union-security clause was not invalid on its face and the judge's dismissal of the allegation that the Respondent's internal appeals procedure violated Sec. 8(b)(1)(A) and (2). The Board reversed the judge and found that the Respondent violated Sec. 8(b)(1)(A) by failing to provide new employees and new nonmembers adequate notice of their rights and obligations under the union-security clause, and reversed the judge's finding that the Respondent violated Sec. 8(b)(1)(A) and (2) by providing financial disclosures that did not provide sufficient information for employees to make an informed choice whether to challenge the figures.

penses incurred in (1) organizing employees of employers other than Schreiber Foods, and (2) representing public sector employees. In remanding these issues, the Board noted that "[a]t the time this case was litigated, the Board had not issued its decision in *California Saw* . . . [holding] that the legality of charging objectors for a particular expense depends on 'whether they are germane to the union's role in collective bargaining, contract administration, and grievance adjustment [and] ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" Id. at 31, citing *California Saw*, 320 NLRB at 239. The Board directed the judge to consider this standard in determining whether the *Beck* objectors herein could lawfully be charged for the Respondent's organizing and public sector expenses. With respect to organizing expenses, the Board explained that the relevant inquiry is whether the Respondent's organizing expenditures are "necessary to 'preserve uniformity of labor standards in the organized workforce . . . and what kinds of employers, either in the Employer's specific industry or in competing industries, the Union might attempt to organize in order to preserve uniform labor standards.'" Id. at 32, quoting *Connecticut Limousine Service*, 324 NLRB 633, 637 (1997).

Subsequent to the Board's remand, and prior to the hearing on remand, several relevant events occurred. First, the Board issued *Food & Commercial Workers Locals 951, 7, & 1036 (Meijer, Inc.)*,[9] which held that, under the standard set forth in *California Saw*, the *Beck* objectors in *Meijer* were lawfully charged for organizing expenses within the retail grocery industry, the competitive market of their employers. Id. at 734.

Second, the General Counsel filed a motion with the judge opposing the Board's remand of the issues of the chargeability of the Respondent's organizing and public sector expenses. The General Counsel argued that a remand was not warranted because the theory of the complaint was not tied to specific expenses of the Respondent. Rather, the "*sole* complaint allegation" was that the objectors could not be charged for "*any* expenses outside their bargaining unit" (emphasis in original). Noting that this "*exclusive* theory of complaint" (emphasis in original) was rejected by the Board in its initial decision, the General Counsel urged that "[s]ince no litigable issues remain on remand, the record should be closed, and [the remaining] complaint [allegations] should be dismissed."

The judge denied the motion. On February 5, 2001, the Board also denied the motion, stating, inter alia, that there remained a "viable issue . . . as to whether certain nonunit expenses are nonchargeable." The Board specified the chargeability of organizing expenses as one of the viable issues. As to this issue, the Board noted that the General Counsel had established at the initial hearing that organizing expenses were being charged to the objectors. Thus, the Respondent had the "burden of going forward to show that these expenditures are properly chargeable under the *California Saw* standard." With respect to organizing expenditures, the Board further stated that the judge should consider the recent decision in *Meijer*.

Concerning the Respondent's expenditures for organizing nonunit employees, the following evidence was presented. At the initial hearing, the Respondent's secretary-treasurer, Fred Gegare, testified that the Respondent had tried to organize employers in the dairy and food processing industries between 1989–1991. According to Gegare, the purpose of the organizing was

> to have parity within our organized groups. We try and get these people organized to bring their wages and benefits up because when we go to the bargaining table one of the biggest complaints is from the employers like Schreiber's is that we have too much non-union competition out there that they are hurting us on the market. That was one of their biggest gripes during this past negotiations.

Gegare was then asked whether "organizing had any impact on the wage rates in your industries," and answered in the affirmative, but, before he could respond to a further question asking how organizing has impacted wages, the judge sustained an objection as to relevance by counsel for the Charging Parties, and no further evidence regarding organizing was taken.

At the reopened hearing, the Respondent sought to meet its evidentiary burden with respect to organizing expenses by presenting the testimony of the Respondent's expert witness, Professor Dale Belman of the Michigan State University School of Labor Relations.[10] The Respondent called Dr. Belman, in the words of its counsel, "to put forth our view that organizing even not in the same industry as Schreiber Foods inures to the benefit of Schreiber employees who are represented by Local 75." Professor Belman testified, in general terms, as to the relationship between the negotiated wages of

[9] 329 NLRB 730 (1999), enf. denied in relevant part sub nom. *Food & Commercial Workers v. NLRB*, 284 F.3d 1099 (9th Cir. 2002), modified and superseded 307 F.3d 760 (2002), cert. denied 537 U.S. 1024 (2002).

[10] Counsel for the General Counsel presented no additional evidence, but participated in the hearing on remand and cross-examined the Respondent's witnesses.

represented employees and the expenditure of funds to organize employees of other employers.

With respect to expenses incurred in representing public-sector bargaining units, the Respondent presented evidence to establish that dues collected from employees working in the public sector covered the Respondent's expenditures for representing those units, so that the objectors' dues and fees were not used for such purposes.

In her posthearing brief to the judge, counsel for the General Counsel renewed the argument that the remanded allegations should be dismissed on the basis previously mentioned, i.e., that the complaint alleged only that it was unlawful for the Respondent to charge the objectors for *any* extra unit expenditures and that, the Board having rejected that theory, the litigation should end.

II. THE JUDGE'S SUPPLEMENTAL DECISION

In his December 12, 2001 supplemental decision, the judge framed the issue before him on remand and his findings as follows:

> As the Board has already decided that a union can charge objectors for expenses incurred in organizing or representing units "within the same competitive market as the bargaining unit employer," the issue herein is whether the Respondent can charge objectors for representational and organizational expenses for employers *outside of the competitive market*. I find that, in the circumstances herein, it can. [Emphasis added.]

The judge dismissed the remanded allegations, but not on the procedural grounds urged by the General Counsel. With respect to organizing expenses, the judge identified the Employer's competitive market as "the dairy and cheese processing industry." As noted above, the judge assumed that the Board had already held in *Meijer* that the Union could charge objectors for organizing employees within the same competitive market as Schreiber Foods. He also determined that the Respondent could charge objectors for organizing expenses incurred outside that competitive market.[11] With regard to the latter finding, the judge, relying on Professor Belman's testimony, found it "very plausible to conclude that an increase in union density in an area would cause wages and working conditions to improve in the area or the occupations involved," especially in a city the size of Green Bay, Wisconsin, where Schreiber is located. He continued:

> So, for example, if the Respondent organized production, maintenance or warehouse employees of a large to medium sized employer located within the City of Green Bay, and the wages of these newly organized employees improved, it appears to me that this would have a dual effect upon the Respondent and its members who were employed by Schreiber. First, it would be known that the wage scale in the city had gone up, and, secondly, there would be fewer lower paid employees in the area who would be available to work for Schreiber if it had to hire additional employees or if it and the Respondent were unable to agree on a new contract.

For these reasons, the judge dismissed the allegations relating to the Respondent's expenditure of the Charging Parties' fees on organizing outside the bargaining unit.

III. POSITIONS OF THE PARTIES

The General Counsel did not file exceptions. In her answering brief, counsel for the General Counsel renewed arguments that the complaint should be dismissed, not on the grounds set out by the judge, but because, after the Board rejected the exclusive theory of the complaint, "no litigable issues remain on remand."

The Charging Parties argue that, under the Supreme Court's decision *Ellis v. Railway Clerks,* 466 U.S. 435 (1984), organizing expenses are, as a matter of law, nonchargeable to objectors. Thus, the Board's decision in *Meijer,* as well as the judge's decision here, should be reversed. Alternatively, the Charging Parties argue that if *Meijer* is not overruled, it should be limited, if not to its facts, to the competitive market of the unit's employer, and that the Respondent failed to demonstrate that its organizing expenditures are chargeable. The Charging Parties assert that Professor Belman's "generic and generalized" testimony failed to show that the Respondent's expenditures for organizing outside the Employer's industry inure to the benefit of the objectors' unit. The Charging Parties further note that the record

[11] Because he found that the evidence did not support a finding that organizing expenses in the public sector benefited unit employees in the private sector, however, the judge held that the public sector expenses incurred by the Union were not lawfully chargeable. He further found that the Respondent had demonstrated that its public sector bargaining units were self-supporting, and that the Charging Parties' funds had not been used to support the public sector units. For the reasons given by the judge, we find that the Respondent met its evidentiary burden of establishing that the dues that it collected from the public sector employees whom it represents fully covered the expenses incurred in representing them. Thus, the Respondent did not unlawfully charge the objectors for any of those expenses. Accordingly, we shall dismiss this aspect of the 8(b)(1)(A) complaint. In light of this result, we find it unnecessary to address the Respondent's argument in its cross-exceptions that the judge erred by holding that a violation would have been established had the evidence shown that the Respondent charged the objectors for its public sector expenses.

contains virtually no details of the Respondent's organizing efforts.

The Respondent argues in cross-exceptions that the complaint should be dismissed because the General Counsel failed to prosecute the remanded issues and to identify the expenses alleged as nonchargeable and the legal basis for that contention. Finally, the Respondent argues that the judge's decision incorrectly imposes on it the burden of showing that a particular expense was chargeable.

We find merit in the Charging Parties' argument that the Respondent failed to carry its burden, as set out in the Board's remand and its February 5, 2001 Order, of demonstrating that its organizing expenses were germane to its role as collective-bargaining representative and inured to the benefit of employees in the Charging Parties' unit. Therefore, we reverse the judge and find that the Respondent violated Section 8(b)(1)(A) and breached the duty of fair representation by charging the Charging Parties and any other objectors in the unit for such expenditures.

IV. DISCUSSION

A. The Procedural Issue

As an initial matter, we adhere to the Board's ruling in its Order of February 5, 2001, denying the General Counsel's special appeal of the judge's order denying the General Counsel's motion to dismiss the remanded complaint allegations. Once adjudication of a case has begun, the decision whether to grant the General Counsel's request to dismiss all or part of the complaint is left to the Board's discretion,[12] and in this case, the Board exercised its discretion and denied the request. In reaching its decision, the Board found that the General Counsel's motion was untimely. In addition, the Board rejected the General Counsel's contention that the case was no longer viable because the Board's decision in *California Saw* was dispositive of the exclusive theory of the complaint, namely that *all* expenses outside the unit were not chargeable to objectors. Instead, the Board correctly found that the parties here had litigated, and the judge had considered, a lesser-included theory, i.e., whether *certain* expenses outside the unit were chargeable to objectors. This interim order thus established the law of the case, which governs the future course of the proceedings.[13]

Counsel for the General Counsel, however, has renewed her request to the Board to withdraw the complaint. Although the law of the case doctrine does not absolutely preclude reconsideration or reversal of a prior decision, such action should not be taken absent "extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'"[14] Counsel for the General Counsel does not challenge the validity of the Board's February 5, 2001 Order or claim that it is erroneous or unjust. Nor does she present evidence that changed circumstances warrant departing from the initial Order, which did nothing more than permit the litigation of statutory claims to continue in order to settle important questions of law. Thus, we deny the General Counsel's renewed request and address the merits of the case.

Member Liebman, in dissent, faults us for finding a violation on a theory that was affirmatively disavowed by the General Counsel. We disagree. Although the General Counsel sought to disavow that position, the Board denied the motion. Thus, the Board held that the position must be addressed on its merits. Our colleague, who signed the decision, has not stated any reason why we should not rely on that decision as the law of the case. There are no such reasons. There are no "extraordinary circumstances" here to justify a disavowal of our prior holding.

B. The Merits

With respect to the Respondent's organizing expenses within Schreiber's competitive market, Chairman Battista and Member Schaumber conclude that the Respondent unlawfully charged the objectors for these expenses. They disagree with the judge that the Respondent presented sufficient evidence to support a finding, under *Meijer*, that its organizing expenses are chargeable to objectors.[15]

In *Meijer*, the Board found that the evidence presented by the unions established that the expenses they incurred in organizing employees employed in the retail grocery business in the same metropolitan area ("the same competitive market") as the bargaining unit employees were lawfully charged to objectors. In finding there that a

[12] See, e.g., *NLRB v. Food & Commercial Workers Local 23,* 484 U.S. 112, 124 (1987); *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981, 982 (1992).

[13] See *Morgan Services,* 339 NLRB 463 fn. 1 (2003) (adhering to law of the case established by prior Board order); *Technology Services Solutions,* 332 NLRB 1096, 1096 fn. 3 (2000) (recognizing that unpublished orders of the Board establish the law of the case in subsequent proceedings); accord: *Virginia Concrete Corp.*, 338 NLRB 1182, 1183 (2003).

[14] *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 fn. 8 (1983)).

[15] Member Schaumber joins Chairman Battista in applying *Meijer* to the facts of this case, and finds a violation. For the reasons set forth in his partial dissent, Member Schaumber believes that *Meijer* was wrongly decided. Although Chairman Battista has grave reservations about *Meijer*, for the reasons set forth in fn. 21, he finds it unnecessary to reach that issue in this case.

"positive relationship between the extent of unionization of employees and negotiated wage rates exist[ed] specifically in the retail food industry,"[16] the Board relied on two categories of evidence.

First, the Board relied on the testimony of experts in the field of economics who had carefully and extensively examined the effects of organizing within the retail grocery industry, and found a "positive and significant relationship between the average hourly earnings of *represented grocery store employees* and the proportion of *grocery store employees* under union representation in the same metropolitan area." Id. at 735 (emphasis added).

Second, the Board cited extensive testimony by representatives of the respondent unions describing a positive relationship between the percentage of employees in the grocery industry work force represented by unions and the representatives' success in negotiating favorable wage rates for their represented employees. Specifically, former UFCW Local 7 President Charles Mercer testified that three unionized employers made up about 90 percent of the market in the Denver area supermarket industry. After a nonunion chain entered the Denver market in 1987, organized employers complained to Local 7 representatives that their higher labor costs rendered them incapable of competing with the nonunion chain, and Local 7 agreed to a reduction in wages after a strike over proposed deeper cuts. Local 7 then conducted a successful organizing campaign aimed at the nonunion firm, and negotiated wage increases in the subsequent collective-bargaining agreement. Id.

Similarly, UFCW Local 951 President Robert Potter testified that Local 951 represents both mercantile and grocery clerks employed by Meijer, a retail grocery and mercantile chain. Potter testified that Meijer's grocery clerks are paid a higher hourly rate than mercantile clerks because organization of mercantile clerks in Michigan lags significantly behind organization in the supermarket industry. Meijer has consistently negotiated lower wages for the mercantile clerks because of the nonunion competition in the mercantile industry. Id.

Robert Bender, who served until 1992 as UFCW Local 7's Wyoming director, testified that Local 7 represents employees of grocery chains Safeway and Albertson's in Colorado and Wyoming, but the wages paid by the Wyoming stores are lower than those paid by the Colorado stores. Both employers have refused to pay Colorado rates to employees at their Wyoming stores on the grounds that the grocery industry in Wyoming is less organized than in Colorado, and the employers face significant nonunion competition in Wyoming. Local 7 Organizer Al Gollas further testified that the nonunion food stores in Wyoming were undercutting the wages paid unionized food stores in Wyoming. Id. at 735–736.

Thus, the direct observations and experience of these union representatives bore out the observations of market operations cited by the expert witnesses, and established a clear linkage between organizing in the retail grocery business in the same metropolitan area and wages for employees in the bargaining units at issue in that case. On this basis, the Board found that the respondents' practice of charging objectors for these activities was lawful and within the union's discretion under its duty of fair representation.[17]

Member Liebman, in dissent, untethers *Meijer* from the facts presented in that case and appears to take the view that *Meijer* established, as a matter of Board law, that organizing within a given employer's "competitive market" is necessarily germane to the union's role as collective-bargaining representative and inures to the benefit of the objector's unit. We firmly disagree. The *Meijer* Board focused on the nature of the employer's industry, the highly competitive retail grocery business located in the same metropolitan area, and emphasized that its holding was based not on generalized assumptions about the benefits of organizing, but on explicit evidence related to the localized industry and the units at issue in the case. The *Meijer* Board distinguished its finding that the respondent unions' organizing benefited unit employees from similar findings rejected in *Ellis v. Railway Clerks,* 466 U.S. 435 (1984), on this basis:

> In contrast to the court of appeals in *Ellis*, we are not finding organizing expenses chargeable in the present case merely on a general notion that organizing makes a union stronger and a stronger union is a more successful bargainer. Rather, our finding is based on a more specific proposition—that there is a direct, positive relationship between the wage levels of union-represented employees and the level of organization of

[16] Id. at 734.

[17] In this respect, we differ fundamentally with Member Liebman. She would find that the Respondent acted within the parameters of its duty of fair representation, and thus lawfully under Sec. 8(b)(1)(A), by charging objectors for organizing expenses, because it would have been reasonable, given the circumstances, for the respondent to assume that organizing was germane to its duties as a representative and inured to the benefit of the unit. However, if the *statute* does not authorize a union to spend objectors' funds on organizing, then regardless of the sincerity of the union's belief that doing so is reasonable and rational, the union cannot lawfully use objectors' funds for organizing and does not act within its duty of fair representation if it does. However broad a union's discretion in balancing the interests of the individuals in represented bargaining units may be, it cannot and does not trump Congress' legislative intent in authorizing union security.

> employees of employers in the same competitive market—and on academic research, empirical data, and *specific evidence* demonstrating that that proposition is accurate. Id. at 738 (footnote omitted and emphasis added).

The "specific evidence" to which the Board referred related to the effect of organizing on the "average hourly earnings of represented grocery store employees and the proportion of grocery store employees under union representation in the same metropolitan area." Id. at 735.

The Board further contrasted its findings with those in *Ellis* by noting that "no empirical evidence was presented [in *Ellis*] demonstrating either the relationship between the represented employees' wages and the level of organization of other employees." Id. Rather, the evidence presented by the union in *Ellis* "spoke only broadly concerning the general need for unions to organize the competitors of organized employers. Unlike the record here, the [evidence] appeared neither to focus on the industry at issue nor to present any specific empirical evidence." Id. Thus, the *Meijer* Board rejected the very argument made by Member Liebman.[18]

In our view, then, *Meijer* permits a union to demonstrate, as the unions did in *Meijer* for the highly competitive retail grocery business located in the same metropolitan area, that "there is a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market." Id. If this same showing is made under analogous factual settings, then under *Meijer* the union may lawfully charge objectors for organizing expenditures.

In the instant case, the evidence advanced by the Respondent fails to meet the standard set in *Meijer*. Professor Belman described his evidence as, in large part, a literature review that supported the general propositions that "increased expenditures on organizing will typically result in increased membership for the union," and that "increasing [union] density will . . . improve the tradeoff between wages and employment and allow unions to raise wages more than they otherwise would." This evidence was based on generalized academic research and was "not specific to the industry that the represented person is employed in." Professor Belman stated, and the Respondent's counsel conceded, that he was not acquainted with the markets or industries relevant to the objectors' unit; nor did he have any knowledge of or acquaintance with the Respondent's organizing efforts. Thus, no evidence was presented at the hearing on remand in this case similar to the focused and specific analysis of the retail food industry in the relevant metropolitan areas at issue in *Meijer*.

The other evidence in the record relevant to the chargeability of the Respondent's organizing expenses was the testimony, quoted above, by the Respondent's secretary-treasurer, Fred Gegare, that the Respondent had attempted to organize certain companies in the dairy and food processing industry that competed with Schreiber Foods in Green Bay, Wisconsin. However, Gegare's testimony was never developed beyond the purpose of the Respondent's organizing efforts to a discussion of the actual effects of those efforts.[19] Unlike the "numerous examples," *Meijer*, 329 NLRB at 735, recounted by the senior officials of the respondent unions in *Meijer*, which demonstrated the accuracy of the proposition that there was a "direct, positive relationship between the wage levels of union-represented employees and the level of organization" in *Meijer*, above at 738, neither Gegare nor any other witness provided any such examples. Thus, we find that the Respondent has failed to meet its burden under *Meijer* of establishing that its organizing expenditures are germane to its duties as a bargaining representative and ultimately inure to the benefit of the objectors' bargaining unit and were not chargeable to objectors. *Schreiber*, supra, 329 NLRB at 31.

In so finding, we recognize that at the initial hearing the Respondent was precluded from adducing further evidence as to its organizing efforts because the judge sustained the Charging Parties' counsel's objection. For this reason, among others, the Board remanded the issue to elicit further evidence on the scope and effect of the Respondent's organizing efforts. As noted above, our remand directed the judge (and the parties) to the Board's decision in *Connecticut Limousine Service*, supra, 324 NLRB at 637, in which the Board set out questions relevant to the chargeability of organizing expenditures, "including, for example, whether the expenditures for organizing were necessary to 'preserve uniformity of labor

[18] Thus, we fundamentally disagree with Member Liebman that the Board's rationale in *Meijer* absolves a union from demonstrating that its organizing activities are germane to its role as a collective-bargaining agent and inure to the benefit of the objector's unit. Our colleague is satisfied with general economic theories stating that increased union density within a competitive market generally results in increased wages in that market. Whatever the merit of such broad theories, they are not determinative in analyzing a particular union's expenditures. In our view, *Meijer* makes clear that the union must produce specific evidence showing a positive correlation between wages and union density in the relevant market at issue. The respondents in *Meijer* met the burden. The Respondent here did not.

[19] Organizing employees in the same industry but outside the geographic area of the unit employees is not likely to yield the kind of direct, positive relationship between wage levels and extent of organizing found in *Meijer*. Other markets involve other considerations such as but not limited to the available labor pool.

standards in the organized workforce' . . . and 'what kinds of employers, either in the Employer's specific industry or in competing industries, the Union might attempt to organize in order to preserve uniform labor standards.'" *Schreiber*, supra, 329 NLRB at 32 (footnote omitted). The Board's February 5, 2001 Order further directed the judge (and the parties) to consider the Board's recent holding in *Meijer*, supra, and noted that the burden on remand was on the Respondent to show that the organizing expenses are chargeable to objectors.

At the hearing on remand, however, the Respondent's evidence failed to address the questions posed by the Board in the initial remand order or in the February 5, 2001 Order. Further, the Respondent's evidence fails to establish, as *Meijer* requires, a nexus between the actual organizing activities the Respondent undertook and a benefit to the objectors' bargaining unit. Instead, Professor Belman testified in general and abstract terms about the effects of organizing, without relation to the Respondent's organizing efforts.

The parties' preliminary discussion of the issues on remand at the reopened hearing indicates that they shared the judge's view, quoted above, that the Board's remand and February 5, 2001 Order presented him with the issue of the chargeability of expenses incurred in organizing employees outside the market of competing employers. We disagree. Nothing in either the remand decision or the February 5, 2001 Order supports the view that the purpose of the remand was to litigate questions pertaining to the chargeability of organizing expenses incurred outside the competitive market, rather than within the competitive market.[20] As to this sole remanded issue, it is clear that the Respondent's evidence did not meet the burden established by the Board's orders. This insufficiency did not arise from the fact that some of Professor Belman's testimony was applicable to organizing outside Schreiber Foods' competitive market, but from the Respondent's failure to connect its organizing efforts with benefits to the objectors' unit. In these circumstances, we find that the Respondent violated Section 8(b)(1)(A).[21]

[20] In any event, the record does not demonstrate that the Respondent incurred any expenses in organizing employers outside the competitive market during the period relevant to the allegations in the complaint. As discussed below in his partial dissent, Member Schaumber would reach this issue.

[21] Chairman Battista notes that Member Schaumber, in his partial dissent, agrees with him that *Meijer* is distinguishable from the instant case. It is axiomatic that where a case is distinguishable, there is no need to overrule it. Thus, Member Schaumber, in reaching out to overrule *Meijer*, has taken an unnecessary step.

The principle of not overruling a case that is distinguishable is firmly grounded in judicial conservatism. A court will ordinarily not reach out to overrule a precedent where a narrower ruling, consistent with precedent, will suffice.

These principles are particularly appropriate here. The *Meijer* case has been considered by only one circuit court since the landmark case of *Beck*. That circuit, the Ninth Circuit sitting en banc, approved *Meijer*, and the Supreme Court denied certiorari. See fn. 9, above. And yet Member Schaumber would reach out to overrule that case.

Chairman Battista does not necessarily endorse the Board's holding in *Meijer*. To the contrary, he has grave doubts about the validity of that case. However, for the reasons set forth above, he would resolve that issue only where it has been squarely presented.

Further, Chairman Battista does not agree that there will be no future occasion to resolve the issue. Presumably, the General Counsel, now aided by this opinion, will understand that organizational expenses cannot be charged unless there is a specific nexus between those expenses and the economic integrity of the unionized unit. And a union, similarly aided by this opinion, will seek to build the kind of record that existed in *Meijer* but does not exist here. Where that showing is made, we will then be squarely presented with the issue of whether organizational expenses can be charged if the nexus is shown.

Finally, Chairman Battista does not agree that the decision today breaches any promise to the Supreme Court. Although the Board apprised the Court that the instant case was pending, the Board did not say that we would resolve the *Meijer* issue no matter what the circumstances. Where, as here, the circumstances show that *Meijer* is distinguishable, Chairman Battista does not believe that the Court would fault us for not here ruling on the validity of *Meijer*. To the contrary, Chairman Battista believes that the Court would fully understand that principles of judicial conservatism warrant a narrower approach. Consistent with those principles, Chairman Battista takes that approach.

V. SUPPLEMENTAL AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

We shall order the Respondent to reimburse the Charging Parties the amount of the dues collected from them that were spent on nonchargeable organizing activities during the accounting period or periods covered by the complaint in which they filed proper objections. In accord with the Amended Remedy set forth in our initial decision, we shall further order the Respondent to reimburse those who filed objections during the accounting period or periods covered by the complaint for the amount of dues collected from them that were spent on nonchargeable organizing activities. Interest on the amount to be reimbursed to the Charging Parties and other objectors, if any, shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

SUPPLEMENTAL ORDER

The National Labor Relations Board orders that the Respondent, Teamsters Local 75, affiliated with the International Brotherhood of Teamsters, Green Bay, Wisconsin, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Charging and collecting from objecting nonmembers in the bargaining unit dues and fees that are attributable to nonchargeable organizing expenditures.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Refund with interest to the Charging Parties and other nonmembers who have filed proper objections during the accounting period or periods prescribed in the amended remedy section of the Board's initial decision, the amount of their dues and fees that were spent on nonchargeable organizing activities.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts of refunds due under the terms of this Supplemental Order.

(c) Within 14 days after service by the Region, post at its union offices in Green Bay, Wisconsin, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by Schreiber Foods, if willing, at all places where notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER SCHAUMBER, dissenting in part.

I. INTRODUCTION

Imagine dropping off a wrecked car at a garage for repairs. After waiting nearly two decades and suing the garage twice, you finally receive a call that the vehicle is ready for pick up. When you arrive, you find that one tire has been patched. This decision today is such a patch job.

Over 17 years ago, two workers at a dairy plant in Wisconsin filed a charge asking the Board to determine whether employees can be compelled to subsidize union organizing activities outside their own bargaining unit. The Board finally responds today, under threat of mandamus, with an intensely fact-specific holding that the precise organizing expenses at issue in this case were not lawfully chargeable. There is the patch. What the Board fails to do, however, is to address the broader and recurring question, one specifically raised and briefed by the parties, namely, whether such expenses are *ever* properly chargeable to *Beck* objectors. That issue was previously considered and, in my view, erroneously decided by a divided Board in *Meijer, Inc.,*[1] a decision repeatedly criticized by other Board members as utterly inconsistent with Supreme Court precedent. My colleagues then compound the error by finding it unnecessary to pass on the judge's unprecedented and unwarranted extension of *Meijer* in the instant case. I would reach and address both issues.

First, the merits of *Meijer*. Were I writing on a clean slate, I might not disagree, based on the evidence presented in that case, with the fairly narrow holding in that decision: expenses incurred in organizing other employers in the highly competitive retail food industry in the same metropolitan area were germane to collective bargaining and ultimately inured to the benefit of the objectors' bargaining unit. Hence, such expenses could be properly charged to *Beck* objectors. However, the slate was not clean when *Meijer* issued. The Supreme Court, in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), had already addressed the chargeability of union organizing expenses under the Railway Labor Act and held that, in enacting legislation permitting parties to negotiate union-security agreements, Congress did not empower unions to require objectors to support organizing efforts directed at employees in other bargaining units. As discussed below, like former Member Brame and Chairman Gould, I agree that the holding in *Ellis* is equally applicable to the National Labor Relations Act and dictates the reversal of *Meijer*.

Further, I find Chairman Battista's and Member Liebman's decision not to reconsider *Meijer* indefensible in light of the representations made by the Board and the Solicitor General to the Supreme Court in the successful

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] 329 NLRB 730 (1999), review granted in relevant part sub nom. *Food & Commercial Workers v. NLRB*, 249 F.3d 1115 (9th Cir. 2001), modified and superseded 307 F.3d 760 (2002), cert. denied 537 U.S. 1024 (2002).

opposition to the charging parties' petition for certiorari in *Meijer*. The Solicitor countered the petitioner's contention that a failure to grant certiorari would render the *Meijer* holding effectively nonreviewable by arguing that the Court's intervention was unwarranted because *this very case* was then pending for decision before the Board and would provide a vehicle for reconsideration. The Board today engages in an abrupt about-face that effectively insulates the *Meijer* decision from appellate and Supreme Court review for the foreseeable future.

Finally, by refusing to decide whether, as the administrative law judge found, the *Meijer* rationale can be extended to broad *classifications of workers* located outside their employers' competitive market, my colleagues create unnecessary uncertainty about the actual scope of the Board's decision in that case. The judge plainly erred in his interpretation and we should say so.

In the absence of a Board majority to overrule *Meijer*, I recognize it as controlling Board law and therefore have joined with Chairman Battista in its application to the facts of this case. I agree for the reasons we state above that the Respondent failed to meet its burden under *Meijer* of demonstrating that "there is a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market."[2] I differ from my colleague in that I would reach the other issues raised by this case and the parties' exceptions.

II. DISCUSSION

A. The Holding in Meijer Should be Revisited by the Full Board

Reconsideration of the Board's decision in *Meijer* is necessary and appropriate for several reasons.

First, doing so fulfills the representations made by a prior Board to the Supreme Court in the opposition to the charging parties' petition for certiorari in *Meijer*. As noted above, the Board argued, through the Solicitor General, that the Supreme Court's intervention was unwarranted because this case was then pending before the Board on exceptions to the judge's decision on remand. In disputing the petitioners' suggestion that, absent the Court's intervention, the Board's holding in *Meijer* would become unreviewable, the Solicitor, referring to this very case, stated, "At least one case presenting the issue raised by this case is currently pending before the Board."[3] Thus, the Supreme Court was explicitly informed that *Meijer* would not be the Board's last word on the issue of the chargeability of organizing expenses and that the issue would be addressed in this case.

It is no answer to now say that the issue need not be decided because a panel majority can apply *Meijer* and grant the Charging Parties the monetary relief they seek. The Charging Parties sought more than monetary relief; they sought reconsideration and reversal of a lead case that directly implicates the Section 7 rights of millions of workers. Furthermore, the Board's representation to the Supreme Court was made a full 3 months after this case had been returned to the Board from a remand to the administrative law judge. Thus, the Board was familiar with the judge's decision, and the potential availability of monetary relief, at the time it made its representation to the Court. Therefore, granting such relief now is no justification for avoiding the substantive validity of *Meijer*.

Similarly, the fact that we can award the monetary relief sought without reaching the merits of *Meijer* does not mean we are compelled to do so. The Board is a quasijudicial body with "the special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1974), quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). The Board has chosen to perform its statutory role principally through adjudication. When necessary to provide effective guidance to the parties it regulates and protects, the Board has not restricted its consideration of issues to those raised by the parties, to the four corners of a complaint, or solely to those issues necessary to reach a decision. Rather, in performing its "special function," the Board has reversed precedent in the absence of a specific request by the parties to do so. See, e.g., *Carpenters Local 1031(Michelle Banta)*, 321 NLRB 30, 32 (1996). When appropriate, the Board also has proceeded on a theory different from that set forth in the General Counsel's complaint. In this very case, for example, the Board rejected the General Counsel's contention that the complaint should be dismissed because *California Saw & Knife Works*[4] was dispositive of the exclusive theory of the complaint, namely that *all* expenses outside the unit were nonchargeable to objectors.[5]

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[2] *Meijer*, supra, 329 NLRB at 738.

[3] *Mulder v. NLRB*, No. 01–1867 Brief for the National Labor Relations Board in Opposition to Petition for Writ of Certiorari (September 25, 2002), p. 17 fn. 6. Earlier in his opposition memorandum, the Solicitor also said: "A case currently pending before the Board presents the organizing-expenses issue raised in the instant case and related issues. See *Teamsters Local 75 (Schreiber Foods)*, No. 30–CB–3077, 2002 WL 1635454 (2001) (supplemental ALJ decision). Two of the three current members of the Board have not yet had an opportunity to express their views on the issue raised in the present case." Id. at. 6 fn. 3.

[4] 320 NLRB 224 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

[5] See discussion of the Board's February 5, 2001 Order in the majority opinion.

Instead, the Board ordered the case to proceed on what it found to be a "lesser-included theory," i.e., whether *certain* expenses outside the unit were chargeable to objectors.

In *California Saw*, supra, the Board did not hesitate to reach important legal issues, even though they were not necessary to the disposition of the case. There, the allegations in the complaint involved the notice rights of nonmember employees under *Communications Workers v. Beck*, 487 U.S. 735 (1988). The case did not involve the separate rights, under *NLRB v. General Motors*, 373 U.S. 734 (1963), of employees to be and remain nonmembers. The Board nonetheless found that the issues were closely related, that the Board would be "remiss" if it failed to reach the latter issue, and instituted the requirement that unions advise employees of their *General Motors* rights at the time they notify employees of their *Beck* rights. *California Saw*, supra, 320 NLRB at 235 fn. 57. In my view, the Board is far more remiss in letting this case languish for so long, and then reneging on the representation to the Supreme Court that the case was a pending vehicle for Board reconsideration of *Meijer*.

A second important reason for addressing *Meijer* is the lack of appellate review of the analysis and holding of the case. At present, only the United States Court of Appeals for the Ninth Circuit has passed directly on the *Meijer* decision,[6] and that court's decision is inconsistent with a decision of the Fourth Circuit on the same issue.[7] Judge Biblowitz' decision below is the only Board case discussing the meaning and reach of *Meijer* since that decision issued. As nearly as can be determined, no cases raising the issue of the chargeability of organizing expenses are currently before the Board. Further, it is unlikely that new charges will be filed or complaints issued that go to the merits of the holding in *Meijer*. The General Counsel's memorandum GC-01-04, *Guidelines for Response to Beck-Related Public Inquiries (*April 6, 2001), states, in relevant part:

> The Board has held that organizing expenses may be charged to *Beck* objectors, at least to the extent the organizing is within the same competitive market as that of the bargaining unit employer. The Board has found that "economists generally agree that there is a positive relationship between the extent of unionization of employees in an industry or locality and negotiated wage rates" (footnotes omitted).[8]

The General Counsel memorandum is the basis for information provided to members of the public who call Board offices with inquiries about the Act and their rights under it. An objector seeking information from the Board concerning the chargeability of union activities would be unlikely to pursue concerns about organizing expenditures in the face of such a statement. Thus, this case represents one of the few opportunities to refine the *Meijer* analysis.

Third, and perhaps most important, reconsideration of *Meijer* is warranted because that decision so directly impacts on fundamental Section 7 rights, including the right to refrain from union activities. In passing the Taft-Hartley Act of 1947, Congress explicitly recognized the right of employees to refrain from union and other concerted activities and effectively eliminated compulsory union membership, limiting employees' "membership" obligation to paying dues and fees. Taft-Hartley also provided limited authorization of union-security agreements and struck a delicate balance between the key principle of voluntary unionism and the practicalities of protecting labor peace and ensuring fairness to bargaining representatives by allowing unions and employers to require employees who enjoy union-won benefits to contribute their fair share to the costs of securing those benefits.

Compelling *Beck* objectors to fund union organizing requires objectors to participate in expanding and spreading ideas and principles—i.e., the benefits of union representation—which they may have rejected.

[6] *Food & Commercial Workers Local 1036 v. NLRB,* supra, 307 F.3d 760 (2002), modifying and superseding 249 F.3d 1115 (2001). It is significant that the Ninth Circuit actually reviewed *Meijer* twice, initially reversing the Board's holding that organizing expenditures can be chargeable to objectors, and subsequently reversing this position in an en banc decision. This about-face illustrates the strengths of the differing views on *Meijer*, and undercuts Member Liebman's assumption that *Meijer* settled the issue of the chargeability of organizing expenses once and for all.

[7] The Ninth Circuit's decision upholding *Meijer* and finding *Ellis* distinguishable from cases arising under the NLRA is in direct conflict with the decision of the Fourth Circuit holding that, under *Ellis*, organizing is nonchargeable to objectors under the NLRA. *Beck v. Communications Workers,* 776 F.2d 1187, 1211–1212 (4th Cir. 1985), affd. en banc 800 F.2d 1280, 1282 (4th Cir. 1986), affd. 487 U.S. 735 (1988) (affirming the district court's approval of the special master's disallowance of the union's expenditures for organizing, finding that, under *Ellis*, supra, such expenditures were not chargeable to objectors because they are outside Congress' authorization).

[8] Neither the Board's decision in *Meijer* nor the expert testimony of Dr. Paula Voos, on which the Board heavily relied, supports the General Counsel's statement describing the Board's finding. The Board's decision specifically addressed the impact of increased union density on wages of retail grocery workers in large metropolitan areas. Dr. Voos' testimony, based on a study and report commissioned by the Union, did not go beyond that industry. Furthermore, Dr. Voos testified that the analysis changes depending on the nature of the market at issue. For example, she said that different methodologies needed to be used for national market industries, such as aerospace, meat packing, and steel as compared to local market industries, such as the retail grocery business at issue in *Meijer.*

Consequently, and because union-security provisions, by their very nature, intrude into an objecting nonmember's exercise of the fundamental statutory right to refrain from union support, it is incumbent on the Board to provide full and careful guidance concerning the lawful parameters of chargeable expenses. My colleagues, however, have failed to do so. Although the decision today of Chairman Battista and myself clarifies the union's burden under *Meijer* of demonstrating that its organizing expenditures are chargeable to objectors, it fails, for want of a majority, to delineate the limits of the Board's holding in *Meijer*. The *Meijer* Board found that organizing within a narrowly-drawn competitive market could be germane to a union's duties as a collective-bargaining representative and could inure to the benefit of an objector's bargaining unit. That narrow holding, however, offers little justification for the judge's extension of *Meijer* beyond the competitive market of the employer. By failing to discuss this issue, my colleagues shirk the Board's obligation to provide such guidance and avoid unnecessary costly litigation for all involved.[9]

B. Meijer is Inconsistent with Controlling Supreme Court Precedent and Should be Reversed

In accord with the views of former Chairman Gould[10] and former Member Brame,[11] I believe, *as a matter of law,* that organizing expenses are nonchargeable to objecting nonmembers under *Ellis v. Railway Clerks*, supra, 466 U.S. at 435.[12]

Section 2, Eleventh of the RLA and Section 8(a)(3) of the NLRA authorize the exaction from objectors of only those fees and dues necessary to "performing the duties of an exclusive [bargaining] representative of the employees in dealing with the employer on labor-management issues."[13] Binding Supreme Court precedent demonstrates that Congress intended that Section 2, Eleventh and Section 8(a)(3) accord unions identical powers with respect to union-security agreements; therefore, *Ellis* cannot be distinguished from cases aris-

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[9] My colleagues defend their failure to fulfill representations made by a prior Board to the Supreme Court by characterizing the representations as something other than a "promise." Member Liebman adds that since the Board was not at full-strength at the time and its reluctance to overrule precedent without a full Board is well-known, the Board was not "signaling to the court that a full-dress reconsideration of *Meijer* was in the offing." As discussed above, the Board, through the Solicitor General, told the Court that:

1. This case is pending before it;

2. It raises the same organizing-expenses issue being raised in *Meijer*;

3. Two current members of the Board have not yet had an opportunity to express their views on this organizing-expense issue; and that

4. Petitioner's suggestion that if certiorari is denied the Board's *Meijer* decision will effectively become nonreviewable is without merit because this case is pending before the Board presenting the issue raised by the petitioners.

If the Board was not telling the Court that *Meijer* was not settled Board law and that it would revisit *Meijer* in this decision, what was it saying?

Member Liebman argues that it is "baseless to complain that the Board is pulling a fast one on the court" because the Board in its petition pointed out to the Court that nonmember objectors can file suit in federal courts claiming the union violated its duty of fair representation by charging them for expenses incurred in organizing within their employer's competitive market. In fact, access to the courts filed under other federal statutes alleging *Beck*-type breaches of the duty of fair representation is very limited. In *Beck*, the Supreme Court squarely held that the Board, not the courts, holds primary jurisdiction over the objectors' statutory claims. The Court noted that in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245 (1959):

> [W]e held that "[w]hen an activity is arguably subject to Sec. 7 or Sec. 8 of the [NLRA], the States *as well as the federal courts* must defer to the exclusive competence of the [Board] if the danger of state interference with national policy is to be averted." Id., at 245 (emphasis added). A simple recitation of respondents' Sec. 8(a)(3) claim reveals that it falls squarely within the primary jurisdiction of the Board . . . There can be no doubt, therefore, that the challenged fee-collecting activity is "subject to" Sec. 8. *Beck*, supra, 487 U.S. at 742

Further, the Board, not the federal courts, is the first line of protection for Section 7 rights, including the right to refrain from union activity. Moreover, as a practical matter, employees may lack the funds or expertise to file actions in Federal court. However, they can call the Board's Regional Office which is there to give them protection and advice, file a charge and, if meritorious, have the General Counsel file a complaint on their behalf.

Member Liebman also considers it "unlikely that the Supreme Court denied the petition for certiorari simply because this case was pending before the Board." I would be inclined to agree, were it not for the fact that the Board did not "simply" advise the court that this case was pending.

The Chairman defends the majority's decision to avoid reaching the merits of *Meijer* as a narrower approach consistent with principles of judicial conservatism. I agree that the Board, like a court, is not free to change, modify, or amend the Act; that it is the chosen policy imperatives of the Congress as set forth in the Act that must control. The Board, however, is not a court. As explained above, it is a quasi-judicial administrative body that has generally chosen adjudication in lieu of rulemaking to fulfill its special statutory role. As the earlier-mentioned examples reflect, the Board has not considered itself constrained by the arguments of the parties or the allegations of a complaint, when compelling circumstances warrant, as they plainly do here. In this long-pending case, the Charging Parties have addressed the merits of *Meijer* and have asked us to overrule it. In my view, failing to consider *Meijer's* merits, under these circumstances and after so many years, diminishes the Board's relevance to the parties.

[10] See *Connecticut Limousine Service*, 324 NLRB 633, 638–639 (1997) (Gould, dissenting in part).

[11] See *Meijer, Inc*., supra, 329 NLRB at 744–746 (Member Brame, dissenting in part).

[12] That two prominent former Members of the Board, with markedly divergent political outlooks, agreed that *Ellis* constituted governing precedent on the issue of the chargeability of organizing expenses under the Act demonstrates that the arguments set out herein raise matters of legal interpretation, not ideology.

[13] *Beck*, supra at 762–763, citing *Ellis,* supra, 466 U.S. at 448.

ing under the NLRA and constitutes binding precedent for the Board.

In *Machinists v. Street*, 367 U.S. 740 (1961), the Court found that in enacting Section 2, Eleventh, Congress curtailed employees' freedom of choice as to union membership only for "the limited purpose of eliminating the problems created by the 'free rider,'"[14] and permitted unions to utilize objectors' funds only to "defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes."[15] The Court found that the statute did not authorize unions to require objectors to support their bargaining representatives' political activities, as such activities did not serve these circumscribed purposes.

In *Ellis,* the Court extended *Street* by holding, in relevant part, that Section 2, Eleventh does not empower unions to require objectors to support organizing efforts directed at other units.[16] Although *Ellis* directly addresses the chargeability of organizing expenses under the RLA, it also determines the chargeability of organizing expenses to objectors under the Act. This was made clear by the Supreme Court in *Communications Workers v. Beck*, supra, 735, where the Court held that union security under the RLA is identical to union security under the NLRA in terms of Congressional policy, meaning, and scope. In *Beck*, the Court interpreted congressional intent in authorizing union-security agreements in Section 8(a)(3). The Court found that, as with Section 2, Eleventh, Congress was concerned that without union security, a "free rider" problem would emerge, and addressed that concern in Section 8(a)(3): "Congress . . . gave unions the power to contract to meet *that problem* [free ridership] while withholding from unions the power to cause the discharge of employees for any other reason."[17] The Court noted further that "Congress intended the same language to have the same meaning in both statutes [Section 8(a)(3) and Section 2, Eleventh]."[18] As the Court explained:

> Section 8(a)(3) and Section 2, Eleventh are . . . "statutory equivalent[s]" . . . because their nearly identical language reflects the fact that *in both* Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost.[19]

Thus, the Supreme Court's interpretation of union security under the RLA and the NLRA is unambiguous: the meaning, reach, and scope of the provisions are identical. There is simply no basis for finding, as the *Meijer* majority did, that Congress intended that unions governed by the NLRA enjoy wider discretion to use funds collected from objectors than do unions governed by the RLA. In the words of former Chairman Gould, attempting to differentiate between the RLA and the NLRA on this basis "manufacture[s] a distinction in applicable law where none exists."[20]

Even apart from the Court's plain statements in *Beck* that the two statutes are coextensive, the applicability of the rationale in *Ellis* to cases decided under the Act has strong support. The *Ellis* Court based its holding that the RLA does not empower unions to require objectors to support organizing efforts directed at other units on three factors. First, the Court found no evidence in the RLA's legislative history that Congress intended Section 2, Eleventh to create "a tool for the expansion of overall union power."[21] Second, the Court recognized that organizing expenditures by their nature go to recruitment of new members outside the objector's unit, and thus afford "only the most attenuated benefits to collective bargaining on behalf of the dues payer."[22] Third, the Court reasoned that allowing unions to require objectors to support their organizing efforts did not serve Congress' goal of eliminating free riders *within the unit*—employees who enjoy the benefits of union representation without paying their fair share toward the cost of securing those benefits. As former Member Brame observed in his dissent in *Meijer*, these reasons apply with equal force to organizing expenditures under Section 8(a)(3).[23]

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[14] Id. at 767.

[15] Id. at 768.

[16] Supra at 451–453.

[17] *Beck*, supra at 749, citing *Radio Officers v. NLRB,* 347 U.S. 17, 41 (1954) (emphasis added in *Beck*).

The Court noted that Congress' other concern in enacting Sec. 8(a)(3) was ending the abuses associated with the closed shop (lawful under the Wagner Act). However, the Court explicitly rejected arguments that union security under the NLRA was distinguishable from the RLA because the RLA was long marked by freedom of choice as to union membership, whereas the NLRA, from its inception, had permitted compulsory membership. The Court found instead that "Congress itself understood its actions in 1947 and 1951 to have placed these respective industries on an equal footing insofar as compulsory unionism was concerned." Id. at 756.

[18] Id. at 745–746 (footnote omitted).

[19] 487 U.S. at 745–746, citing *Ellis,* supra at 452 fn. 13 (footnote and citations omitted and emphasis added).

[20] *Connecticut Limousine Service*, supra at 639 (Member Gould, dissenting in part).

[21] *Ellis,* 745–746 at 451.

[22] Id. at 452.

[23] *Meijer*, supra at 744.

Like the RLA, the NLRA's legislative history contains no hint that Congress intended Section 8(a)(3) to promote organizing or to encourage the spread of unionization. Moreover, under the Act, as under the RLA, where a union shop provision is in place, the bargaining unit is already organized. Thus, organizing outside the objectors' bargaining unit under the NLRA, as under the RLA, "can afford only the most attenuated benefits" to objectors. Finally, under both the Act and the RLA, the "free rider" that the Court had in mind was not the nonbargaining unit employee whose wages might be raised as an incident of successful organizing, but the employee within the bargaining unit whose coworkers are subsidizing the union-secured benefits he enjoys.

The majority in *Meijer* sought to differentiate the NLRA from the RLA by arguing that Congress placed a greater emphasis on organizing under the Act than under the RLA, and that union security is an integral part of the NLRA's statutory scheme, but was added to the RLA "almost as an afterthought."[24] These distinctions are specious. Protection of the right to organize is at the foundation of both statutes. Moreover, the notion that Congress authorized union security as an afterthought under the RLA is baffling to me. Section 2, Eleventh was enacted 4 years after the enactment of Section 8(a)(3) after extensive Congressional hearings. As discussed above, the two statutes arose from virtually identical concerns and were intended to accomplish identical purposes. The fundamental congruence between the RLA and the NLRA further supports the Court's determination that, as far as union security is concerned, the statutes are equivalent.[25] Moreover, in *Communications Workers v. Beck*, 776 F.2d 1187 (4th Cir. 1985), which was upheld by the Supreme Court in *Beck*, supra, 487 U.S. 735, the appeals court squarely rejected the union's position there that "*Street* . . . and *Ellis* are not as relevant to the construction of Section 8(a)(3) as they are to the construction of Section 2, Eleventh." 776 F.2d at 1200.[26]

Other Supreme Court decisions support the view that Section 2, Eleventh and Section 8(a)(3), as statutory equivalents, share precedent. In *Abood v. Detroit Board of Education*, the Supreme Court addressed the constitutionality of a Michigan statute regulating collective bargaining for public employees and authorizing union-security agreements. The Court found that the statute was modeled on Federal laws and looked to its decisions interpreting Section 2, Eleventh, i.e., *Railway Employees Dept. v. Hanson,* 351 U.S. 225 (1956), and *Street*, supra, 367 U.S. 740, to construe the statute. The Court found that under this precedent, the Michigan statute's authorization of union-security agreements was constitutional insofar as objectors' fees were used for representational purposes. 431 U.S. at 225.

The Court's decision in *Abood* presents a unified vision of federal labor policy extending even to State labor policy, to the extent that State law is modeled on Federal laws. That policy provides for the selection by the majority of employees in a bargaining unit of a representative for all unit employees, and requires that representative to represent all of those employees fairly and in good faith. To fairly allocate the burden of such representation, this labor policy authorizes the representative to require all employees to pay their fair share of the costs of representation. Id. at 221–223. These principles are cardinal characteristics of the NLRA, just as they are of the RLA. In articulating them, the *Abood* Court repeatedly referred to Section 8(a)(3). See, e.g., id. at 217 fn. 10. In light of this unequivocal recognition by the Supreme Court of the indivisibility of Federal labor policy respecting union security, *Meijer*'s attempt to carve out differences between Section 8(a)(3) and Section 2, Eleventh fails.

Much has been made of the evidence adduced in *Meijer* to support the conclusion that, as a practical matter, organizing, at least within the unit employer's competitive market, benefits the objector's unit. Under the Supreme Court's analysis in *Ellis*, such evidence is not relevant to the chargeability of organizing expenditures. Assuming arguendo that a union's efforts to expand the base of organized workers in the retail food industry improves the union's leverage as a bargaining agent, the Supreme Court's analysis in *Ellis* moots reliance on such effects by finding, *as a matter of law*, that Congress did not authorize the expenditure of objectors' funds for organizing.

The *Ellis* Court did not fail to notice that, in the real world, organizing takes place and can change unions' leverage at the bargaining table. Rather, the Court found that Congress based its limited authorization of union security on specific considerations that are incompatible

[24] Id. at 737.

[25] In upholding the Board's decision in *Meijer,* the Ninth Circuit rejected the argument that the Supreme Court's finding that the RLA and the NLRA are statutory equivalents governs the chargeability of organizing expenditures under the Act. 307 F.3d at 771. I respectfully disagree with the court. In my view, the Supreme Court's holding is the final word on the subject and the Board is not free to hold otherwise under the NLRA.

[26] The court further noted that the union's pleadings there "appeared to have conceded" that, after *Abood v. Detroit Board of Education*, 431 U.S. 209, 223 (1977), discussed below, the principles articulated in *Street* and other cases construing Sec. 2, Eleventh apply equally to employees not covered by the RLA. Id.

with requiring objectors to support organizing efforts. The Court examined whether charging objecting employees for organizing would serve Congress' narrow goals in authorizing union security, not whether organizing itself was good or bad, useful or futile, desirable or undesirable. The Court's interpretation of Congressional intent sets absolute limits on the Board's discretion in effectuating that intent.[27] Thus, in this case, Judge Biblowitz' findings that expenses incurred by the Respondent in organizing nonunit employees within the competitive market are chargeable to objectors are clearly wrong as a matter of law in light of *Ellis.*

Member Liebman faults me for ignoring the practical effects of organizing. I do not. However, I am constrained by what I view as clearly articulated Supreme Court precedent. As I stated above, even assuming that expenses incurred in organizing retail grocery workers located in the same geographic market make it easier for unions to negotiate higher wages for similar workers in that market, the Supreme Court has cast the permissibility of such charges as an issue to be resolved as a matter of law. Thus, the fundamental question is whether the statute permits unions to require objectors to financially support such activities, not whether, as a factual matter, organizing other employers within "the same competitive market" makes it easier to negotiate terms and conditions of employment. Only because I am constrained to apply *Meijer* as controlling Board law in this case have I considered the practical effects of such organizing in finding a violation of Section 8(b)(1)(A).[28]

C. The Judge Erred in Purporting to Extend Meijer to Similar Classifications of Workers

As stated above, I believe that *Meijer* is inconsistent with Supreme Court precedent and therefore invalid as a matter of law. A fortiori, any extension of that decision would also be invalid, again as a matter of law. However, in the absence of a majority of the Board to overrule *Meijer*, I have concurred in applying its holding to the facts of this case. I wish to make clear, however, that in my view, the judge plainly erred in purporting to extend *Meijer* to expenses incurred in organizing a classification of workers similar to those in the bargaining unit, but employed by employers outside the industry of the organized employer.[29] *Meijer* cannot be read to support such a finding, and I dissent from my colleagues' failure to join me in making that point clear.

In *Meijer*, the Board relied on the nature of the employer's market, not the makeup of the local work force, as the framework for its analysis. Although there was some testimony in *Meijer* that economists have found an overall positive relationship between the degree of organization and the level of contractual wages, the Board relied on and found decisive Professor Paula Voos' examination of "whether the wages of supermarket workers were influenced by the number of all grocery store workers unionized within the same metropolitan area." Id. at 734 (emphasis added). Voos' analysis focused on the identity of the bargaining unit employer in the highly competitive retail food industry, and the Board's holding was cast in those terms. Thus, the *Meijer* Board's focus on the unit employer's market competitors flowed from the testimony of the economic experts in that case.[30]

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[27] In *Ellis*, the Supreme Court set out the test for the chargeability of expenditures: "when employees such as petitioners [in this case] object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing *with the employer* on labor-management issues." 466 U.S. at 448 (emphasis added); cited with approval in *Beck*, 487 U.S. at 762–763. In *Ellis*, the Court clearly found that organizing expenditures did not satisfy the requirements of this test.

[28] Member Liebman states my position as being that organizing expenses are "never" chargeable as if to suggest some room exists in the law, as interpreted by the Supreme Court in *Ellis* and *Beck,* which would permit their chargeability under some circumstances. For the reasons discussed above, for me there is none.

[29] In *Meijer*, the Board left this issue open:

> There is no contention here that Local 7 and Local 951 have sought to organize employees of employers who are not competitors of the employers of the employees represented by the Respondents. Nor do we read the judge's decision as holding that a union's costs of organizing beyond the competitive market are chargeable to objectors. Accordingly, the organizing expenses that we find chargeable here are limited to those spent by Local 7 and Local 951 within the competitive market. We find it unnecessary to decide and shall defer to another case the question of whether unions may charge objectors for organizing costs incurred outside the competitive market. [Id. 734 fn. 20.]

[30] Although, as mentioned, the Board relied heavily on the report and testimony of Dr. Voos, the extent to which union organizing inures to the overall benefit of bargaining unit members in the retail grocery business is not without question. Dr. Voos' study and the report she issued was limited to the impact of increased union density on the *wages* of retail grocery workers in large metropolitan areas. She did not study what impact increased union density had on the fringe benefits retail grocery workers received. She agreed that in the retail grocery industry an increase in wages to union scale results in decreased profits which could be a factor in the adoption of labor saving measures, such as the increased use of scanners, decreasing the overall number of union jobs. Her study and report did not address whether such a correlation existed. Voos conceded during cross-examination that while the authors of two of the reports she relied upon found a positive relationship between the extent of union density and wages, they also found that the impact on wages was insignificant. There would, of course, be no impact if the organizational effort was unsuccessful and Dr. Voos acknowledged that less than 50 percent of the Union's organizing campaigns are successful, and of those, one-third never result in collective bargaining agreements. Furthermore, Voos did not study what motivates a worker to oppose unionization, but she agreed that there may be

In addition, the testimony offered by the respondent unions in *Meijer* centered on the negotiating leverage that derived from organizing companies in direct competition with the bargaining unit employer. According to the union representatives, employers asserted at the bargaining table that they could not accept the union's proposals because they could not then compete with nonunion market competitors in the same market who, because of lower labor costs, offered identical goods at a lower price. Id. at 735–736. The testimony in *Meijer* indicated that by organizing the competition, the unions eliminated any pricing advantage and thereby facilitated higher wages because the bargaining unit's employer could pass on higher labor costs to consumers without losing business.

The economic theories and data presented in *Meijer* do not support the entirely different economic hypothesis set out by the judge—namely, that increasing the density of organized employees with similar skill sets in a given geographic area would also tend to result in an increase in wages and benefits within the *Beck* objector's unit. That may be a plausible theory, but it requires evidence and analysis of factors such as the relevant labor market, the transferability of skills sets, and the range of employment choices available in the area. No such analysis occurred in *Meijer*, and the judge certainly did not undertake such a study in this case.

Moreover, assuming that the *Meijer* rationale plausibly could be extended in the manner suggested by the judge, the record here does not support a finding that such organizing expenses inured to the benefit of unit employees at Schreiber Foods. Judge Biblowitz found, based solely on the testimony of Professor Dale Belman, that expenses incurred in organizing employees outside the dairy/food processing industry were chargeable to objectors. Professor Belman's testimony, however, consisted of little more than summaries of broad studies illustrating general economic principles, without any connection to the specific facts of this case.[31] That evidence is too flimsy and speculative to justify an extension of *Meijer* to virtually any private-sector organizing expenses. Consequently, the judge's findings regarding the applicability of the *Meijer* rationale to the similar classifications of workers located within a geographic area cannot stand.

As mentioned, the Board's failure to reach this issue leaves bargaining representatives and employees working under union-security agreements without appropriate guidance concerning the chargeability of such expenditures. As the law stands now, neither unions nor *Beck* objectors can reasonably predict whether extra-unit organizing expenses of other employees in industries different from those of the organized employer will be found to be properly chargeable.[32] The Board has the authority and the special expertise necessary to resolve this difficult chargeability issue, or to set standards to guide the decisions of unions and employees. I believe we should exercise that authority here.

III. CONCLUSION

For the reasons stated above, I respectfully dissent from my colleagues' failure to reach the merits of *Meijer* and overrule that decision as inconsistent with controlling Supreme Court precedent, which would place it in a position for further appellate and Supreme Court review. In addition, I part company with Chairman Battista and Member Liebman's failure to address whether the judge erred in purporting to extend *Meijer* beyond expenses incurred in organizing employers in highly competitive industries located within the same competitive market. In the absence of a Board majority to revisit and overrule *Meijer*, however, I have joined with Chairman Battista in finding that the Respondent violated Section 8(b)(1)(A) by charging objectors for expenses incurred in organizing employees outside the bargaining unit.

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some nonunion employees and bargaining unit members who do not want union representation because they see offsetting negatives to it. Among those cited during her examination were the possibility of strikes, the necessity to pay a union initiation fee and union dues, and ideological reasons.

At the time of the hearing in *Meijer*, Voos' report had not been subject to critical peer review. In fact, Voos testified that she intended the report to remain unpublished.

[31] Belman further indicated that there were limits on the benefits to a given bargaining unit of organizing outside the competitive market—for example, organizing employees with different skills, and working in a different industry and locality would be "simply organizing that's irrelevant to Schreiber Foods."

[32] The same uncertainty affects the General Counsel and his allocation of his scarce resources. After *Meijer* issued, the General Counsel issued to the Regional Offices Operations Management Memorandum 99–68, instructing field attorneys and offices in the handling of charges relating to charging objectors for organizing expenses:

> [A]ll Regions should examine [such] allegations . . . [to] determine whether the organizing expenses at issue are related solely to organizing "within the competitive market" under *Meijer*, or instead extend to employers who are not competitors of the employers of the employees at issue. The Region may find it necessary to conduct additional investigation to make this determination.
>
> If a Region concludes that the organizing expenses being charged in its case are within the employer's "competitive market" under *Meijer*, it should dismiss that allegation. On the other hand, if the Region concludes that the organizing expenses at issue in its case extend outside the "competitive market" under *Meijer*, it should submit that case to the Division of Advice as to whether it should argue that these costs are not properly chargeable.

MEMBER LIEBMAN, dissenting in part.

Today the majority finds that the Union violated its duty of fair representation and Section 8(b)(1)(A) of the Act by charging a pair of nonmember *Beck* objectors their fair share of the Union's organizing expenses. The majority reaches this result despite controlling Board and court precedent to the contrary, and on a theory that is at odds with accepted economic theory, empirical evidence, practical experience, and common sense.[1]

I.

The Union, Teamsters Local 75, represents a bargaining unit of employees of Schreiber Foods, a cheese processing company in Green Bay, Wisconsin. The Charging Parties are nonmembers who have exercised their right under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to pay only dues that support the Union's representational functions. From 1989 through 1991, the Union incurred certain expenses in attempting to organize employees of employers in the same competitive market as Schreiber. As I show, the Union lawfully charged the objectors for those organizing expenses.[2]

II.

In *Beck*, the Supreme Court held that an employee who is not a union member, but who is represented under a union-security clause, cannot be compelled to pay, over his objection, union dues and fees for purposes other than those germane to collective bargaining, contract administration, and grievance adjustment.[3] In *California Saw & Knife Works*,[4] the Board held that expenses incurred outside an objector's bargaining unit are chargeable only if they are "germane to the union's role in collective bargaining, contract administration, and grievance adjustment," and incurred for "services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization."[5]

Neither the Supreme Court in *Beck* nor the Board in *California Saw* addressed the question whether unions' extra-unit organizing expenditures are chargeable to *Beck* objectors. In *Food & Commercial Workers Locals 951, 7, & 1036 (Meijer, Inc.)*,[6] however, the Board answered that question in the affirmative, at least with respect to organizing activities within the same competitive market as the bargaining unit employees.

The Board in *Meijer* first observed that Congress, in enacting the NLRA, had recognized the desirability of encouraging union organizing as a means of promoting effective collective bargaining: "Implicit is Congress' understanding that organization of multiple groups of employees, not just a single bargaining unit or the employees of a single employer in an industry, was necessary to achieve its goals of stabilizing wage rates and preventing depression of employees' wage rates and purchasing power."[7]

The Board also found "abundant evidence that, in collective bargaining, unions are able to obtain higher wages for the employees they represent, whether union members or not, when the employees of employers in the same competitive market are organized."[8] In this regard, the Board cited testimony from expert labor economists, based on their own research and that of other economists, establishing that "economists generally agree that there is a positive relationship between the extent of unionization of employees in an industry or locality and negotiated wage rates. That is, represented employees' wage rates increase or decline as the percentage of employees who are unionized increases or declines."[9] One of the economists who testified for the Union stated that this relationship had been observed early in the Twentieth Century and is now taken for granted by institutional labor economists.[10] Even the General Counsel's economics expert conceded that a positive relationship exists between the percentage of employees organized and the level of union wages.[11] The Board found those precepts

[1] The majority's decision is based on a theory that was not advanced, and indeed was affirmatively disavowed, by the General Counsel. As more fully explained in the majority opinion, the complaint alleged that the Union violated Sec. 8(b)(1)(A) by charging the objectors for *any* expenditures incurred outside of their bargaining unit. When the Board dismissed that allegation, the General Counsel opposed having to litigate the case on the unalleged theory that extra-unit organizing expenditures were nonchargeable, and moved to dismiss this portion of the complaint. The Board denied the motion. Although counsel for the General Counsel participated in the hearing on remand, the General Counsel continues to argue that the complaint should be dismissed. In refusing this reasonable request, the majority effectively has given the Charging Parties control over the complaint.

Member Schaumber would also overrule Board precedent and hold that extra-unit organizing expenses are never chargeable to *Beck* objectors. I address his position in part IV, below.

[2] As the majority has found, there is no evidence that the Union incurred any expenses of organizing employers in other industries. And although the Union did incur expenses of organizing public sector employees, it demonstrated that none of the objectors' dues went to support those organizing efforts.

[3] Above at 745.

[4] 320 NLRB 224 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

[5] Above at 239, quoting *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 524 (1991).

[6] 329 NLRB 730 (1999).

[7] Id. at 734.

[8] Id.

[9] Id.

[10] Id.

[11] Id.

borne out in the results of numerous empirical studies on the effects of organizing on union wages.[12]

Finally, the Board cited testimony from union officials concerning the difficulties unions had encountered, in both the retail grocery and meatpacking industries, in trying to obtain higher wages from employers faced with significant competition from low-wage, nonunion firms.[13] As one union negotiator testified, an employer told him, "I cannot pay any more than the nonunion competition. You guys need to go out and organize them and get their wages up. We don't mind paying the wages as long as everyone else is paying the same thing."[14]

In light of this overwhelming evidence, the Board found that

> organizing is both germane to a union's role as a collective-bargaining representative and can benefit all employees in a unit already represented by a union. Unions are able to negotiate higher wages for the employees they represent when the employees of employers in the same competitive market are organized, and unions are less able to do so when they are not organized. Thus, represented employees, whether or not they are members of the union that represents them, benefit, through the results of collective-bargaining, from that union's organization of other employees and consequently, under *Beck*, may be charged their fair share of the union's organizing expenses.[15]

In sum, the Board held that, "at least with respect to organizing within the same competitive market as the bargaining unit employer, organizing expenses are chargeable to bargaining unit employees under the *California Saw* standard."[16]

A unanimous Ninth Circuit Court of Appeals, en banc, affirmed the Board's ruling as "fully consistent with the realities of collective bargaining."[17] The court observed that organizing the employees of competing employers

> may be crucial to improving the wages, benefits, and working conditions of employees in the bargaining unit. Organizing outside the bargaining unit, when successful, 'eliminat[es] the competition of employers and employees based on labor conditions regarded as substandard.' *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 [] (1940). The fact that an employer's competitors are not unionized, and likely pay lower wages and provide lesser benefits, significantly weakens the union's ability to bargain with the employer, and decreases the union's prospects of achieving the economic objectives of the members of the bargaining unit.[18]

The court also pointed out that the legislative history of the Taft-Hartley amendments supports the Board's ruling in *Meijer*:

> Members of Congress enacting Section 8(a)(3) in 1947 vigorously (and successfully) opposed a proposal prohibiting a union from serving as the exclusive bargaining representative for competing employers precisely because *union organizing of competing employers "protects wage standards from being undercut by lower-wage areas and lower-wage employers*." 2 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 1039 (Sen. Murray). Similarly, they argued, "employees must make their combination extend beyond one shop" because otherwise "organized workers would . . . be required to conform to the standard of the lowest paid, unorganized workers." 1 Id. at 680 (Rep. Price).[19]

The court found that the Board's ruling "was supported by extensive economic research and data on organizing and collective bargaining *in general*, as well as with respect to the retail food industry."[20] Accordingly, the court held that the Board's conclusion—"that, for NLRA industries, organizing within the competitive market is germane to collective bargaining" (and therefore chargeable to *Beck* objectors)—was "completely in accord with the economic realities of collective bargaining, as well as with the language and purposes of the NLRA."[21]

III.

As stated, the evidence establishes that the only organizing expenses for which the Union charged the *Beck* objectors were incurred in organizing employees of Schreiber's competitors. Accordingly, under *Meijer*, the Union acted lawfully in charging the objectors for those expenditures, and this portion of the complaint should be dismissed.

The majority, however, finds that the Union failed to establish that its organizing expenses were chargeable, even under *Meijer*. The majority reasons that, whereas the union in *Meijer* introduced expert empirical testi-

[12] Id. at 734–735.
[13] Id. at 735–736.
[14] Id. at 736.
[15] Id.
[16] Id. at 734 (footnote omitted).
[17] *Food & Commercial Workers Local 1036 v. NLRB*, 307 F.3d 760, 768 (2002), cert. denied sub nom. *Mulder v. NLRB*, 537 U.S. 1024 (2002).
[18] Id. at 768–769.
[19] Id. at 769 fn. 12.
[20] Id. at 769 (emphasis added).
[21] Id.

mony concerning the impact of organizing on union wage rates in the industry in question (the retail food industry), the Union here did not. Instead, it offered only expert testimony based on general labor and industrial relations theory, not on empirical research conducted in the food processing industry. The majority also reasons that, unlike the unions in *Meijer*, the Union failed to provide testimony from union officials concerning the actual effects of organizing on union wage rates in the food processing industry. (The majority concedes that the Union's attorney attempted to elicit such testimony but was prevented from doing so when the judge sustained an objection from the Charging Parties' attorney.)[22] Accordingly, the majority holds that the Union failed to demonstrate that its organizing expenditures were necessary to preserve labor standards in the bargaining unit.

The majority's view is simply incorrect. It is based on a demonstrably flawed reading of the Board's holding in *Meijer* and on a complete misunderstanding of the evidence in that case. It is also inconsistent with applicable duty of fair representation principles.

A.

The majority apparently reads *Meijer* as requiring, *in each case*, that the union demonstrate empirically that organizing within the industry employing *Beck* objectors leads to increased union wage rates *in that industry*. That is not so.

True, the union in *Meijer* had demonstrated such effects in the retail food industry, and that was one factor the Board relied on in finding the union's organizing expenses to be chargeable. But the Board did not say, or fairly imply, that such a demonstration in a given industry was necessary to establish chargeability in that industry. (Had that been the Board's intention, it surely would not have relied in significant part on mainstream economic and industrial relations theory, unions' experiences with organizing in the meatpacking industry, or the wealth of empirical econometric studies demonstrating the effects of organization on union wage rates generally.[23]) To the contrary, the Board explicitly held, without limitation, that "at least with respect to organizing within the same competitive market as the bargaining unit employer, *organizing expenses are chargeable to bargaining unit employees.*"[24] There is no suggestion in that statement or anywhere else in *Meijer* that the Board's holding was limited to the facts of that case.

In affirming the Board, the Ninth Circuit made clear that it understood exactly what the Board's holding was: "[T]he NLRB found that, *for NLRA industries, organizing within the competitive market is germane to collective bargaining*."[25] Thus, under *Meijer*, the Union's organizing expenses within the food processing industry are chargeable, despite the absence of a particularized showing that increased organizing leads to higher union wages in that industry.

B.

The Board's finding in *Meijer* that organizing expenditures within the competitive market are germane to collective bargaining was compelled by the realities of collective bargaining and by the overwhelming weight of theoretical, empirical, and anecdotal evidence. Because those factors are, in the main, present here and would be present in virtually any case in which the chargeability of organizing expenses is an issue, the majority errs in apparently requiring an empirical demonstration of a relationship between union organizing and union wage rates in every case.

As explained, one of the basic realities in industrial relations is that, in order to defend the union wage rate, a union must try to organize competing nonunion firms; otherwise, union employers will be reluctant to pay the union rate for fear of losing business to their competitors. The Board in *Meijer* recognized this basic precept; so did the Ninth Circuit; and so have Congress and the Supreme Court.

Moreover, that precept has been generally recognized as valid by labor economists and industrial relations experts. The union in *Meijer* presented the expert testimony of Dr. Paula Voos, associate professor of economics and industrial relations at the University of Wisconsin-Madison, and Dr. Charles Craypo, chairman of the economics department at the University of Notre Dame. Dr. Voos and Dr. Craypo both explained that, as the extent of organizing in a given market increases, unions are better able to negotiate for higher wages (and to prevent union wages from falling), chiefly because there is less

[22] Theoretically, the Union could have attempted again to introduce its evidence at the hearing on remand. It is clear, however, that all parties at that hearing, as well as the judge, believed that *Meijer* had disposed of the issue of the chargeability of organizing expenses within the competitive market, and that the only remaining issues concerned the chargeability of such expenses outside the competitive market. The Union accordingly would reasonably have believed that it would be unnecessary to introduce evidence concerning the effects of its organizing efforts within the competitive market on the wages of unit employees.

[23] The majority ignores this evidence entirely. In fact, it states, erroneously, that the only factors the Board considered in *Meijer* were econometric studies of, and the experiences of union officials in, the retail grocery industry.

[24] Id. at 734 (footnote omitted; emphasis added).

[25] Above at 769 (emphasis added).

low-wage, nonunion competition to undercut union wage rates.[26]

Dr. Voos and Dr. Craypo supported this proposition with numerous concrete examples. Dr. Craypo described how union wages in the formerly heavily unionized meatpacking industry fell sharply with the advent of significant nonunion competition, and began to stabilize and recover after unions began to succeed in organizing some of the newer, formerly nonunion, companies. Dr. Voos presented an econometric study she performed on the effects of organizing on union wages in the retail food industry, which demonstrated a positive and significant relationship between the average earnings of unionized retail grocery workers and the percentage of such workers with union representation in the same metropolitan area. In her study, Dr. Voos observed that, in all but 2 of some 20 studies performed by other economists, the researchers reported significant positive relationships between the percentage of employees organized and the level of union wages.[27]

In any event, the scholarly work discussed merely confirms what union negotiators have long known from personal experience. As recounted, union witnesses in *Meijer* testified to the difficulty of attempting to negotiate wage gains in the face of significant nonunion competition. Similar testimony was given in this case. The Union's secretary-treasurer, Fred Gegare, testified that the purpose of the Union's organizing was

> to have parity within our organized groups. We try and get these people organized to bring their wages and benefits up because when we go to the bargaining table one of the biggest complaints is from the employers like Schreiber's is that we have too much nonunion competition out there that they are hurting us on the market. That was one of their biggest gripes during this past negotiations.[28]

In short, the considerations that the Board relied on in *Meijer* are, for the most part, not unique to the retail food industry. They are applicable to union organizing efforts in general, as labor economic and industrial relations theory, empirical evidence, and practical experience confirm. That is why the Board in *Meijer* did not limit its holding to the retail food industry, and why the court of appeals affirmed the Board's broadly worded decision as "completely in accord with the economic realities of collective bargaining." Thus, although the Union did not introduce explicit evidence of the effects of organizing on union wages in the food processing industry, I see no reason—and the majority suggests none—why that effect should be qualitatively different from similar effects in other industries.[29]

The majority insists, however, that in distinguishing *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), the Board in *Meijer* relied exclusively on evidence concerning the retail grocery industry. That is incorrect.

Ellis arose under the Railway Labor Act. In it, the Supreme Court held that extra-unit organizing expenses were not chargeable to nonmember objectors because it found that such expenses could have "only the most attenuated benefits" to collective bargaining on behalf of such individuals.[30] As the Board in *Meijer* observed, however, the Court's finding was based on the unique conditions prevailing in the railroad industry. At relevant times, the railroads were highly organized: some 75 to 80 percent of railroad employees were union mem-

[26] See also Reynolds, Masters & Moser, *Labor Economics and Labor Relations*, 579–580 (1986) ("As the percentage of unionization rises, the amount of business that can be lost to nonunion firms decreases. Thus demand for the product of union firms, and hence their derived demand for labor, will become less elastic than before. This makes wage raising easier, and so the union wage should rise as the percentage organized increases.")

[27] Other empirical studies similarly indicate that the percentage of workers organized in a particular competitive market has a strong positive relationship with the wages of union members. See, e.g., Rosen, *Trade Union Power, Threat Effects and the Extent of Organization*, 36 Rev. of Econ. Stud. 185 (1969); Freeman & Medoff, *The Impact of the Percentage Organized on Union and Nonunion Wages*, 63 Rev. of Econ. & Stat. 561 (1981); Moore, Newman, & Cunningham, *The Effect of the Extent of Unionism on Union and Nonunion Wages*, 6 J. of Lab. Res. 21 (1985); Hirsch & Neufeld, *Nominal and Real Union Wage Differentials and the Effects of Industry and SMSA Density: 1973–1983*, 22 J. of Hum. Resources 138 (1987); Curme & Macpherson, *Union Wage Differentials and the Effects of Industry and Local Union Density: Evidence from the 1980s*, 12 J. of Lab. Res. 419 (1991).

Possibly the oldest joke in the economics profession is that if all economists were laid end to end, they still would not reach a conclusion. Ironically, where nearly all economists *have* reached the conclusion that, other things being equal, increased organization leads to higher union wage rates, the majority nonetheless appears to believe that the issue is in doubt.

[28] Andrew Stern, president of the Service Employees International Union, has made essentially the same point in the context of organizing janitors in northern New Jersey. Stern formed the opinion that cleaning companies, for the most part, would be amenable to raising their employees' wages and benefits, but feared that if they did so, they would lose business to cheaper competitors. Acting on that belief, instead of attempting to organize cleaning companies piecemeal, Stern set out to organize the entire market at once. Key to this approach was to promise employers that the union contract would take effect only if over half of them signed it. As a result, the SEIU wound up, in effect, regulating the entire market, representing some 70 percent of the area's janitors at substantial pay increases (doubled in many cases). "The New Boss," *New York Times Magazine*, Jan. 30, 2005.

[29] Reasoning like the majority, one might argue that Galileo's demonstration of the law of gravity is valid, but only in the vicinity of Pisa, Italy.

[30] Id. at 452.

bers. Perhaps for that reason, the president of one of the railroad brotherhoods had testified before Congress that he did not think that allowing the union shop would increase the railroad unions' bargaining power.[31]

With respect to the chargeability (vel non) of extra-unit organizing expenses, then, the already heavily-organized railroad industry was the exception that proves the rule—an industry in which further organizing could not be expected to benefit already-represented nonmember objectors. Absent some empirical evidence showing that organizing in the railroad industry did, in fact, benefit objectors, there was no basis for holding that railroad unions could charge objectors for organizing expenses. That is what the Board in *Meijer* was talking about when it stated that "[i]n *Ellis*, unlike here, no empirical evidence was presented demonstrating . . . the relationship between the represented employees' wages and the level of organization of other employees."[32] In so stating, however, the Board neither held nor implied that such industry-specific evidence need be presented in other industries, where the unusual conditions prevailing among the railroads do not exist. To the contrary, the Board stated generally that

> In contrast to the court of appeals in *Ellis*, we are not finding organizing expenses chargeable in the present case merely on a general notion that organizing makes a union stronger and a stronger union is a more successful bargainer. Rather, our finding is based on a more specific proposition—that there is a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market—and on academic research, empirical data, and specific evidence demonstrating that that proposition is accurate.[33]

As shown, the "academic research, empirical data, and specific evidence" relied on by the Board in *Meijer* was not limited to the retail grocery industry.

For all these reasons, the absence of specific evidence concerning the effects of union organizing in the food processing industry on the level of union wages in that industry is no justification for the majority's finding that the Union's organizing expenditures were not chargeable to the *Beck* objectors.

C.

The majority's finding is infirm for another reason: it is inconsistent with the principles of the duty of fair representation, which apply to unions' conduct in the *Beck* context.[34] The Supreme Court has held that a union violates the duty of fair representation only if its conduct is "arbitrary, discriminatory, or in bad faith," and that this standard applies to all union activity.[35] In finding that that standard should apply in the *Beck* context, the Board expressly observed that both individual bargaining unit members and the bargaining unit as a whole have legitimate and sometimes conflicting interests, and that the Board's task is to carefully strike a balance between those competing interests.[36] In this regard, the Board particularly noted that the Supreme Court has cautioned against excessive second-guessing of unions' actions: "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[37]

In light of these principles, it is clear that the Union did not violate its duty of fair representation by charging the *Beck* objectors their portion of the Union's organizing expenses. Even without an econometric study showing a positive effect of union organization on union wages in the food processing industry, the scholarship discussed here, together with the practical experience of union negotiators, establishes that the Union could (and did) hold a reasonable belief that organizing would have such an effect, and thus would benefit all members of the bargaining unit at Schreiber, including the objectors. Union Secretary-Treasurer Gegare testified to that effect on the basis of his personal experiences in bargaining. Basic principles of industrial relations, empirical research in industry generally, and common sense all support Gegare's testimony. In these circumstances, it can hardly be said that charging the objectors for organizing expenses, in a good-faith, well-founded belief that those expenses were incurred for the benefit of the entire bargaining unit, was "arbitrary, discriminatory, or in bad faith." To the contrary, it was well within the "wide range of reasonableness" which the Supreme Court has admonished the courts and the Board to afford unions in their decisionmaking, and therefore did not violate the duty of fair representation.[38]

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[31] 329 NLRB at 736–737.
[32] Id. at 738.
[33] Id.

[34] *California Saw*, supra, 320 NLRB at 230.
[35] *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991), quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).
[36] *California Saw*, supra, 320 NLRB at 230, citing *Breininger v. Sheet Metal Workers*, 493 U.S. 67, 77 (1989).
[37] 320 NLRB at 229, quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).
[38] The majority contends that, even if the Union had such a belief, it was unlawful to act on that belief if the Act does not allow unions to charge objecting nonmembers for organizing expenses. The majority has it backwards. If the Union acted on a reasonable, good-faith belief

IV.

Although he agrees with Chairman Battista that, even under *Meijer*, the Union could not lawfully charge the *Beck* objectors for extra-unit organizing expenses, Member Schaumber nevertheless would overrule *Meijer* and hold that such expenses are never chargeable. He contends that this result is dictated by the Supreme Court's decision in *Ellis*. Both the Board in *Meijer* and the Ninth Circuit persuasively rejected this position and the arguments supporting it. I see no need to reargue the merits of *Meijer* here.[39]

I do wish to address, and reject, Member Schaumber's argument that the Board is somehow obliged to reconsider *Meijer* in this case, given its representations to the Supreme Court in opposition to the petition for a writ of certiorari to the Ninth Circuit in *Mulder*. In that opposition, the Solicitor General of the United States (on behalf of the Board) contended that

> The court of appeals' decision is correct and does not conflict with any decision of [the Supreme Court] or of any other court of appeals. Further review by this Court is therefore not warranted. *Mulder v. NLRB*, No. 01-1867, Brief of National Labor Relations Board in Opposition to Petition for Writ of Certiorari, p. 8 (Sept. 25, 2002).[40]

The Solicitor General also informed the Court that this case was pending before the Board and that two of the then-current Members of the Board had not had an opportunity to express their views on the subject of the chargeability of organizing expenses.[41] The Solicitor General made this representation in response to the argument that denial of the petition would effectively insulate the Board's holding in *Meijer* from review. Accordingly, Member Schaumber suggests that the Supreme Court denied the petition in *Mulder* because the Board had effectively promised that it would revisit (and perhaps overrule) *Meijer* in this case, and that the Board is now breaking faith with the Court in not doing so. Member Schaumber further argues that the Board's refusal to reconsider *Meijer* here, coupled with the absence of pending cases presenting the issue of the chargeability of organizing expenses, severely limits the "opportunities to refine the *Meijer* analysis." There is no merit in these arguments.

First, as Chairman Battista states, the Board's representation to the Court that this case was pending hardly amounts to a promise that the Board, as constituted in 2002, would reconsider and possibly overrule *Meijer*. As it informed the Court, the Board at that time comprised only three Members. (Two were recess appointees.) Given the Board's well-known reluctance to overrule precedent when at less than full strength (five Members), the Board could not have been signaling to the Court that a full-dress reconsideration of *Meijer* was in the offing.

Second, the Board reminded the Court that other avenues existed for bringing the issue of the chargeability of organizing expenses to the courts' attention:

> Moreover, as the *Beck* litigation demonstrates, nonmember objectors may bring actions in federal court asserting that their union violates the duty of fair representation by charging them for organizational expenses incurred in the competitive market. That provides an additional mechanism by which courts would have occasion to address the legal issues presented by the Board's position here.[42]

Thus, there is no basis for Member Schaumber's contention that the Board's position in *Meijer* will be unreviewable if we do not reconsider it in this case, and that fact was made clear to the Supreme Court.[43] Accordingly, it is baseless to make the argument, as Member Schaumber does, that the Board is pulling a fast one on the Court by not reconsidering *Meijer* here.

Finally, it is unlikely that the Supreme Court denied the petition for certiorari simply because this case was pending before the Board. After all, the petitioners argued (as does Member Schaumber) that the Board's position in *Meijer* was foreclosed by *Ellis* and that the Ninth Circuit's decision affirming *Meijer* created a split in the

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that extra-unit organizing expenditures benefit members of the bargaining unit, its actions did not violate the duty of fair representation and, accordingly, did not violate the Act either.

[39] I agree with Chairman Battista that it is unnecessary for the majority to revisit *Meijer* in this case because, in the majority's view, the Union's conduct was unlawful even under *Meijer*. As explained above, I disagree with that view. I also think that *Meijer* was correctly decided, and accordingly I would not reconsider it.

Member Schaumber, however, suggests that the Charging Parties cannot be made whole by monetary relief for the violation found by the majority, because they also sought reconsideration and reversal of *Meijer*. This argument is odd. It implies that the prevailing party in an action is entitled, not merely to full relief, but to require the tribunal to accept that party's view of the law (which, in this case, just happens to be Member Schaumber's view). Not surprisingly, Member Schaumber cites no authority for this novel proposition. By insisting that *Meijer* be overruled, even though that is not necessary to deciding this case, Member Schaumber indulges in judicial activism.

[40] The Solicitor General rebutted the argument, adopted by Member Schaumber here, that *Meijer* is in conflict with a decision of the Fourth Circuit. Id. at 15–16.

[41] Id. at 6 fn. 3.

[42] Id. at 17 fn. 6. The majority ignores this argument.

[43] As Chairman Battista also observes, there likely will remain opportunities for the Board to reconsider *Meijer* in future cases, should it choose to do so.

circuits. Either one of those arguments, if accepted, would furnish ample grounds for Supreme Court review, yet the Court denied the petition. In these circumstances, it would be, at best, a stretch to infer that the Court, rather than reining in the Board, would wait for the possibility that the Board would "correct" itself.

V.

It is clear, for all the foregoing reasons, that the Union acted lawfully in charging the *Beck* objectors their fair share of the Union's expenses in organizing employees of Schreiber's competitors. In finding to the contrary, the majority holds, in effect, that no matter how much theoretical and empirical evidence has been introduced showing that increased union organizing helps to increase and protect union wage rates, no union may charge *Beck* objectors for such expenses unless it hires a labor economist to prove that such a relationship exists in the particular industry in which the union is the objectors' bargaining agent. (For the multitude of local unions in this country, including many tiny locals, this could be an enormous regulatory burden hardly making worthwhile the collection of dues at all.) It is impossible to see why unions should be forced to incur costs of proving, again and again, what seems obvious to everyone in the labor relations community except for our expert agency. I dissent.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT charge and collect from nonmembers in the bargaining unit who have filed objections in accord with the United States Supreme Court decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988), for dues and fees that we spend on nonchargeable organizing activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL refund with interest to every nonmember unit employee who has filed a *Beck* objection the amount of their dues and fees that we spent on nonchargeable organizing activities, in the manner set forth in the Board's supplemental decisions.

TEAMSTERS LOCAL 75, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Sherry Lee Pirlott and *David E. Pirlott,* Charging Parties.

SUPPLEMENTAL DECISION

I. BACKGROUND

JOEL P. BIBLOWITZ, Administrative Law Judge. On September 4, 1992, I issued a *Beck*[1] decision at 329 NLRB 28 (1999), in this matter following a hearing conducted on March 5, 1992, in Green Bay, Wisconsin. By Decision and Order dated September 1, 1999, the Board affirmed and adopted some of the findings contained in my decision and reversed one of my findings. In addition, the Board severed an issue and remanded it to me for further proceedings, including, if necessary, a reopening of the hearing to adduce additional evidence:

> We find that the issue pertaining to the chargeability of union expenses for activities outside the bargaining unit, including organizing expenses and expenses attributable to the representation of public sector employees, shall be severed from the instant proceeding and remanded to the judge.

The "public sector" reference relates to the fact that in addition to representing employees of private employers such as Schreiber Foods (Schreiber), Teamsters Local 75, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Respondent) represents employees employed by the city of Green Bay, as well as employees employed by Brown and Shawano Counties. By motion dated March 9, 2000, the General Counsel moved that I close the record and dismiss the remaining portion of the complaint; the Charging Party filed a response opposing this motion. By Order dated February 5, 2001, the Board denied the General Counsel's motion as untimely and because it felt that summary dismissal would be inappropriate. In its Order, the Board again stated that it was remanding the case to address the chargeability of certain nonunit expenditures under the standards set forth in *California Saw & Knife Works,* 320 NLRB 224 (1995), and *Food & Commercial Workers Locals 951, 7, & 1036 (Meijer, Inc.)*, 329 NLRB 730 (1999). In addition, the Board stated:

> In denying the General Counsel's appeal, we emphasize that our Order is not to be construed as requiring the General

[1] *Communications Workers v. Beck,* 487 U.S. 735 (1988).

> Counsel to present any additional evidence, nor does it effectively convert this proceeding into a two-party private litigation. On the current record, the General Counsel has shown that certain nonunit expenditures are being charged. The Respondent at this point has the burden of going forward to show that these expenditures are properly chargeable under the *California Saw* standard. The Charging Party and the General Counsel have the right to respond to the Respondent's defense.

The hearing reopened in Milwaukee, Wisconsin, on October 10, 2001, and closed on the following day. The Respondent presented three witnesses: Professor Dale Belman of the Michigan State University School of Labor Relations, Danny McGowan, a business agent of the Respondent, and Detlef Pavlovich, a certified public accountant who has been the Respondent's accountant for a number of years. The Charging Party called Irving Ross, also a certified public accountant, in an attempt to rebut portions of Pavlovich's testimony. Respondent has a two-pronged defense: the nonunit expenses are chargeable to objectors under *California Saw* and like cases because these expenditures inured to the benefit of Schreiber unit employees; Respondent further argues that its expenditures toward its public sector members do not violate the Act because the dues it receives from these public sector members covers these expenditures. The result is "a wash" and therefore it represents no cost to its private-sector members.

Since the issuance of my decision, the Board has issued a number of relevant decisions in this area, particularly *California Saw* and *Meijer*.[2] In *California Saw* the General Counsel urged an 8(b)(1)(A) violation for charging objectors for expenses incurred outside of their bargaining units, even if the fruits of those expenditures inured to the benefit of the objecting employee's own unit. The Board rejected this argument, stating: "We agree with the judge, for the reasons set forth by him, that the duty of fair representation does not require the IAM to calculate its *Beck* dues reductions on a unit-by-unit basis." The Board next had to decide whether the union violated the Act by charging an objector in one bargaining unit for litigation expenses incurred by another bargaining unit:

> [T]he litigation expenses that the IAM has sought to charge *Beck* objectors, though broader than unit specific, are confined to those which "may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." The critical inquiry is thus whether specific litigation that most directly involves employees in one bargaining unit is inherently not "germane to collective-bargaining contract administration and grievance adjustment" of employees in any other bargaining unit. [Citing *Beck.*]

After some discussion, the Board found:

> [W]e find that the duty of fair representation does not require unions to segregate litigation costs on a unit-by-unit basis, as long as the categories of litigation charged to objecting employees are related to the union's basic representational functions, and are not the type of political extra-unit litigation that concerned the Court in *Lehnert*.

In *Meijer,* the Board found: "at least with respect to organizing within the same competitive market as the bargaining unit employer, organizing expenses are chargeable to bargaining unit employees under the *California Saw* standard."[3] So there could be no doubt of the parameters of its decision, at footnote 20, the Board stated:

> There is no contention here that Local 7 and Local 951 have sought to organize employees of employers who are not competitors of the employers of the employees represented by the Respondents. Nor do we read the judge's decision as holding that a union's cost of organizing beyond the competitive market are chargeable to objectors. Accordingly, the organizing expenses that we find chargeable here are limited to those spent by Local 7 and Local 951 within the competitive market. We find it unnecessary to decide and shall defer to another case the question of whether unions may charge objectors for organizing costs incurred outside the competitive market.

This is the other case that the Board was referring to. In the instant matter, the question is, can a union charge objectors for expenses incurred outside of the industry in which they were employed, and/or for expenses incurred in representing employees in the public sector.

II. THE FACTS

A. Chargeability of Expenses

Professor Belman testified extensively on the effects of organizing upon the wages and working conditions of the existing bargaining unit members in both the private and public sector, in the same industry and across industries. He testified:

> I think that the evidence based on research by labor economists and social scientists supports the view that expenditures on organizing benefits currently represented members and both in terms of wages, in terms of total compensation and more generally, in terms of improved terms and conditions of work. The evidence is that the benefit is general, that it is not specific to the industry that the represented person is employed in.

Professor Belman also testified about studies prepared by Dr. Paula B. Voos:[4]

> Professor Voos also looked at the issue of did organizing provide net benefits to existing represented employees. In other

[2] *California Saw* and *Meijer* each found *Ellis v. Railway Clerks,* 466 U.S. 435 (1984), distinguishable and not controlling under the NLRA.

[3] In my initial Decision, I found that unions should be allowed to charge members for organizational and collective-bargaining expenses in units in the same industry: "Most employers are not philanthropists willing to pay their employees whatever they want. Rather an employer will usually agree to a competitive wage that it can afford. When a union organizes other employers in the industry, and executes contracts with these employers, others in the industry can, competitively, be more flexible than if they were the only organized shop in the industry."

[4] Dr. Voos' studies are cited by the Board in *Meijer*.

> words, does a dollar expended on organizing in net raise those employees earnings by at least their investment and she finds a return on the order of two to three dollars per dollar expended. So not only is—does additional expenditure on organizing result in new members, the effects of that organizing in net has a positive benefit to cost ration.

He continued:

> Labor economics theory . . . suggest as we increase union membership and so union coverage, union density, percent organized in an industry, occupation or location, that unions will be able to raise the wage of represented individuals…the more labor economics flavored side of this talks about this as reducing the elasticity of labor demand…as you organize an entire product market, it's no longer possible for consumers to purchase non-union produced goods. As a result, it's easier for the union employers to pass price increases, wage increases, on to consumers . . . Likewise, on the other side of the market, as you organize more employees in a given labor market, you reduce the availability of non-union workers to employers and that in turn also—we would talk about it formally as reducing the elasticity of labor demand.

Belman testified that this theory is "broadly accepted, it's generally taught." He also testified that in an industry that is completely organized, bargained for wage increases are very easily passed on to the consumer. However, if the industry is only partially organized, and he gives the example of the automobile industry, it becomes harder to push the wages up because consumers can switch from purchasing the union product to purchasing the nonunion product. He testified: "This theory is a general theory, it would apply to appropriately defined labor markets and product markets." He testified that other economists say that increasing density, the percentage of employees in the labor market who are unionized, is an important factor in increasing a union's bargaining power. The higher the density, the more leverage the union has over the employer, and the less it costs the employer to agree to the union's demands. In other words, the higher percentage of the market that has been organized, the less an organized employer has to worry about nonunion competitors, and the easier it will be to pass on the cost of a settlement with the union:

> What's very clear again in the industrial relations theory, that the degree to which the union can organize the labor market is very important in its ability to achieve its bargaining goals which will include wages, total compensation, terms and conditions of work.

Professor Belman was then asked:

> Q. And so would it be a true or false statement to say that economic theory predicts that as Local 75 spends money to organize the dairy industry that will have a beneficial effect on dissenters in the Schreiber bargaining unit?
>
> A. That is correct.
>
> Q. Would it be a true or false statement to say that as Local 75 spends money outside of the dairy industry to organize, that would also have a beneficial effect on the dissenters in the Schreiber unit.
>
> A. That is correct. That is what economic theory would indicate.

He testified that there are many studies about increased density *by industry*. These studies conclude that a 10-percent increase in density in an industry will result in a wage increase of from 1 to 4 percent for the unionized workers in the industry although, he testified, this 10-percent figure is used as a measuring device rather than substantively, and he does not know of any area where density has increased by 10 percent. There would be a similar result for increased density *by occupation*:

> If you're a truck driver in a dairy plant, food products plant and Local 75 goes out and organizes truck drivers in other industries, they organize truck drivers in motor freight and push up the wage of truck drivers, that will benefit truck drivers throughout that occupation without regard to the industry that they're working in. And that's sensible because, if you think about it, what you're saying is you're pushing up truck drivers' wages . . . that means to recruit drivers . . . an adequate number of truck drivers, you're going to have to compete against those higher wages that are occurring perhaps outside of your industry, but to attract appropriately skilled individuals you would have to be aware of wages for people with the same skills, same occupation, same working conditions.
>
> Q. So if I'm a janitor in a bargaining unit at Schreiber Foods, it's going to help me that janitors anywhere get organized?
>
> A. That is the implication of the occupational research.
>
> Q. Okay. And does the research actually support the theory on that?
>
> A. Yes it does. I would certainly . . . would argue that.
>
> Q. Okay. The third area you told us you examined was the area of geography or locale?
>
> A. Right.
>
> Q. And does the empirical evidence support economic theory with respect to its prediction in geographic areas or locale?
>
> A. I would argue that it does support the view that increasing organization in a metropolitan area raises the wages in that metropolitan area at least for local labor markets and local product markets.

Professor Belman testified that one study indicates that a 10-percent increase in density in a standard metropolitan statistical area raises wages by about 2 percent. However, he and Professor Voos find that an exception to this occurs where there is nationwide bargaining in an industry; in these situations, the same effect would not occur. For example, the increased organization of aerospace workers in Milwaukee would not benefit aerospace workers in Milwaukee because of the nationwide bargaining in this industry.

> Q. And if I understand what you have said, in ordinary English, if we take the studies that combine industry effects and the effects of locale and we disregard that incremental effect and look just at the studies that concentrate on locale, do they support the economic theory that orga-

nizing in a locale, regardless of industry, raises the wage rates?

A. That is correct.

Q. And that's true for covered . . . people who are covered by agreements?

A. That is correct.

Q. So, the empirical research then supports the notion that if Local 75 organizes in and about Green Bay, regardless of industry or occupation, that has a positive effect on wages at the Schreiber bargaining unit?

A. That is correct, with the exception that if they are organizing national . . . firms that are in national product markets, it probably does not have a positive effect, but if they're organizing local firms that operate in local markets . . . and local means regional for most of these . . . then certainly there is a positive effect.

Q. So an example of that would be the aerospace industry as a national market?

A. That's correct. That's national bargaining. But the contrast would be trucking for construction. That would be a local market and it would have a positive effect.

In the conclusion of his direct examination, Professor Belman testified: "In my opinion, economic research would say that . . . money spent by Local 75 on organizing would, on average, benefit its members."

Professor Belman also testified briefly on the other remanded issue, the Respondent's expenses attributable to its representation of public sector employees, although it should be noted that the Respondent's principle defense is not that these expenses inure to the benefit of the private sector employees, but that there was no "net expense" in representing the public sector employees. He testified: "I'm not sure that I'm convinced there's effect of public sector organizing on private sector manufacturing wages." He testified that there are exceptions, however. For example, if public sector nurses were organized, because they represent a significant portion of the total number of nurses "that clearly puts pressure on the private sector to meet those wages or to keep ahead . . . to maintain the wage structure relative to the public sector." Another example, this time relating to the instant matter, would relate to the Respondent organizing truckdrivers in the Green Bay area and that would inure to the benefit of the Schreiber employees, including its drivers. He testified: "The relationship would seem to be more clear cut . . . There's a common labor market. In the common labor market as you drive wages up there's very likely to be an effect of pulling up wages in other people within that common labor market."

B. No Net Expense in Representation of Public Sector Employees

The Respondent here defends that even if an increase in density in public sector employees does not inure to the benefit of the private sector employees, there is no violation because there was no cost to the Schreiber unit employees in representing the public sector employees because their dues and initiation fees covered the costs of representation. The principal witness on this subject was Pavlovich. He faced a number of obstacles in establishing the Respondent's defense because the year in question was 1989, when the unfair labor practice charge was filed. The principal difficulty, of course, was the lack of supporting documents 12 years later. This required a lot of estimations and assumptions and resulting allocations that were objected to by Ross, the Charging Party's CPA witness.

McGowan testified to his duties and the Respondent's hierarchy in 1989. As a business agent for the Respondent in 1989 he handled from 25 to 30 bargaining units, both private and public sector. He performed the same services, generally, for both the private and public sector units. At that time he covered about 17 public sector units, including employees of the City of Green Bay and county employees and about 10 or 11 private sector units. The two largest private sector units that he covered had a total of about 330 employees, drivers and warehousemen; the two largest public sector units, including building custodians, equipment operators, truckdrivers, laborers, mechanics, correction officers, account clerks, and typists, had about the same number of employees. At that time, only he and one other business agent, Mike Wolt, who only stayed in Respondent's employ for a couple of years, represented the Respondent's public sector units. Wolt worked with a number of the agents to learn the Respondent's operation and sat in with McGowan with about seven of the public sector units. McGowan was asked:

Q. Now, taking into account your time and his time when he was training with you in the public sector, how much business agent time did Local 75 devote to the public sector in the year 1989?

A. One.

Q. You're going to have to be a little more forthcoming about that.

A. One . . . the equivalent of one full time business agent.

Q. Given that you also represented 11 private sector bargaining units, how is it possible that 100 percent of your time could have been devoted to the public sector?

A. Well, I've taken into consideration the time that Mike Wolt would have spent in on public sector bargaining also, he accomplished a certain portion of that so the sum total between his time and my time in the public sector equated out to one full time.

At the time, the Respondent had seven agents, including himself, Wolt, and the two principal officers, as well as three clerical employees. When McGowan needed assistance from the clerical employees for his public sector work, he went to any one of them, whoever was available. He did not use the clerical employees any more or less than any of the other agents and used less than half of one clerical's total time. When he had meetings with unit employees or stewards, the meetings were held at the union hall whenever possible. If not, the Respondent rented a room at a local hotel. He used his car about equally for both private and public sector units. He could not differentiate between the time spent negotiating an agreement with a private sector employer as compared to a public sector employer; either one could be quick or drawn out. The wages in the public sector varied greatly from the highest—plumbing, heating and electrical inspectors, to the lowest—the part-time school crossing

guards.

Pavlovich spent the principal amount of time testifying how he arrived at the figures in his compilations, Respondent's Exhibits 20–25. Initially, by examining deposit slips[5] from the period, he was able to determine the number of members at the time. The Respondent had records setting forth the public sector units and the number of members in each, and with this information he determined that in 1989 the public sector members constituted 17 percent of the entire membership. This 17-percent figure is important because, where there was no supporting records, Pavlovich used this figure in allocating expenses between the public and private sector units. In order to determine the dues paid by the public sector members, Pavlovich divided the amount of the deposits (from the 1990 deposit slips that he had) by the number of members in these units (which he also had), for an average dues rate of $16.22. He determined the initiation fees received from the public sector members by taking 17 percent of the Respondent's new members, 363, or 62, and multiplying this by $16.22, for a total of $1000. He testified that he did not use 17 percent of the total amount of the initiation fees received in that year, approximately $21,000 because the public sector initiation fee was less than the private sector fee. He then credited the public sector members for 17 percent of the Respondent's interest and dividend income ($81,000), or $14,000. Based on these figures, he determined that the public sector members contributed approximately $154,000 to the Respondent in 1989.

Pavlovich next allocated the Respondent's expenses for 1989 between the public sector and the private sector members. The Respondent pays per capita taxes to the International Union, to the Conference and to the Joint Council on a yearly basis. Pavlovich allocated 17 percent of the amount to the public sector units. The Respondent also paid a yearly per capita tax in 1989 to the Green Bay Building Trades Council; as this does not relate to the public sector, none of this expense was allocated to the public sector. For salaries, as per McGowan's testimony, he determined that it was fair to charge the public sector for one business agent's salary—McGowan's, which was $53,000 at that time. The total salaries that year for the clerical employees was $63,000; as there were seven business agents at that time, and he was told that the business agents used the clerical employees equally, Pavlovich charged the public sector for 1/7th of this expense. Civic and charitable contributions made by the Respondent in 1989 were also allocated on the basis of 83 percent and 17 percent. In allocating pension and health benefits and payroll taxes, he used a lower percentage (about 13 percent) because it only included McGowan's salary and the portion of a clerical previously allocated to the public sector. For professional fees and education and stewards' expense, he returned to the 17-percent allocation to the public sector unit. For meeting and automobile expenses, he allocated all of McGowan's expenses for the year, even though he had testified that not all of these expenses were in response to his public sector representation. For building maintenance and administrative expenses, he, apparently, returned to the approximately 13 percent he had employed earlier based upon the salaries of McGowan and an allocated portion of a clerical employee. The Respondent's travel costs in 1989, $21,000, were not allocated to the public sector because Pavlovich determined that they were no related to public sector activities. On the basis of these allocations, he determined that the Respondent's public sector expenses in 1989 were $152,000, somewhat less than its public-sector income that same year.

Ross disagreed with some of Pavlovich's allocations. He testified that in his professional opinion, Pavlovich did not properly utilize certain cost principles in making his allocations, and did not comply with generally accepted accounting principles and standards in preparing his income and expenditure summary of the public sector units:

> The "total" numbers, under the public and private columns, I don't know if they're overstated; I don't know if they're understated. What I do know, is that Mr. Pavlovich had difficulty because of the lack of sufficient underlying evidence to support the allocations that would be made under Generally Accepted Cost Accounting Principles.

Ross testified further about his difficulties with Pavlovich's allocations:

> and he said . . . the average number of public employees represents 17 percent of the total. Which, I have no problem, in terms of that percentage. It's what he did with that percentage that—in my professional opinion, does not comply with the cost accounting principles we've been discussing. What relationship does the amount of per capita tax that Local 75 pays, have to the 17 percent? There are no records, that I'm aware of, that were made available, that support this type of relationship.
>
> If we go down—the same thing was done for lost time. For contributions. Professional fees. The assumption that this ratio of time is a proper basis for allocating professional fees . . . has not been documented. Now, I understand the difficulty Mr. Pavlovich had because, as he testified, a lot of these records did not exist. Never the less, he went on and allocated the education stewards expenses based on the same 17 percent. As a matter of fact, over 37 and a half percent of the total expenses allocated as public sector, were based on this 17 percent percentage.

He also disagreed with Pavlovich's allocation of 100 percent of McGowan's salary into the public sector expense column. He testified: "Obviously, the ideal situation would have been time records. They don't exist. In my professional opinion, what Mr. Pavlovich did in allocating salaries was not reasonable. Was not accurate." He testified that if he was asked to perform the studies that the Respondent asked of Pavlovich, he would have refused because "there is insufficient, competent, evidential matter to support what they're trying to ask me to do." If the client insisted, he would have less difficulty performing the study if it were solely for internal use. However, one that was for external use, such as the instant matter, should require a

[5] He could only locate deposit slips for 11 months, so he used an average of the 11 months. In addition, there were some differences in the amount of the deposits, indicating that some were made at the end of a month and were not credited until the following month. This discrepancy was cleared up by averaging the months.

disclaimer that it was the best that he could do based on the facts and information that was available at the time.

III. ANALYSIS

The initial issue is the chargeability for the Respondent's expenses for activities outside the bargaining area. As the Board has already decided that a union can charge objectors for expenses incurred in organizing or representing units "within the same competitive market as the bargaining unit employer," the issue is whether the Respondent can charge objectors for representational and organizational expenses for employers outside of the competitive market. I find that, in the circumstances herein, it can.

Initially, I should note that counsel for the Respondent, in his Brief, alleges that "competitive markets" refers not only to product markets, but markets for employees as well. This interpretation would give the Respondent and other unions substantially more leeway in charging dissenters for expenses incurred in other units. It would probably allow a union to charge dissenters for organizing and other expenses in any unit in an area the size of Green Bay as you could consider all individuals living in the area who are willing and able to work as being within this "competitive market." I do not believe that the Board meant this term to have such a far reaching effect. In fact, the Board in *Meijer,* supra at 734 fn. 20, stated, inter alia: "There is no contention here that Local 7 and Local 251 have sought to organize employees of the employers *who are not competitors of the employers of the employees* represented by the Respondents." (Emphasis added.) I therefore find that the Board meant this term to mean employers who were (in this case) in the cheese or food processing industry.

I found Professor Belman's testimony both credible and reasonable. It is very plausible to conclude that an increase in union density in an area would cause wages and working conditions to improve in the area or the occupations involved. This is especially true in a small city such as Green Bay, Wisconsin, with a population of about 88,000. So, for example, if the Respondent organized production, maintenance or warehouse employees of a large to medium sized employer located within the City of Green Bay, and the wages of these newly organized employees improved, it appears to me that this would have a dual effect upon the Respondent and its members who were employed by Schreiber. First, it would be known that the wage scale in the city had gone up, and, secondly, there would be fewer lower paid employees in the area who would be available to work for Schreiber if it had to hire additional employees or if it and the Respondent were unable to agree on a new contract. Although this might not be true in New York City, Chicago, or Los Angeles, I believe that it would be so in a city the size of Green Bay. Further, although this proposition might be more obvious in a unit of truckdrivers or nurses, as testified to by Belman, it would also be true of a production and maintenance unit as is present herein. Belman used the term "elasticity." It appears to me that the higher the union density in a certain area such as Green Bay, the less elasticity there is in the labor market, and the fewer choices employers such as Schreiber would have. This would have a tendency to raise the wages of the Schreiber unit employees. I therefore find that the Respondent's expenses, both within and without Schreiber's competitive market, including organizational expenses, are chargeable to the Schreiber unit, including the dissenters, because the benefits inure to the bargaining unit employees.

I would not reach the same conclusion, however, for expenses, organizing and otherwise, for Respondent's public-sector units. With the exception of certain occupations such as nurses and truckdrivers, as testified to by Belman, I find that there is little evidence that an increase in the density of public-sector employees, even in a city such as Green Bay, would inure to the benefit of the Schreiber unit employees. However, I agree with the Respondent that it did not violate the Act regarding its public-sector units because the expenses of representing these units is covered by the income (dues, initiation fees, interest, and dividend income) received from these public-sector employees. Therefore, there was no expense or charge to the Schreiber unit employees, including the dissenters, for representing the public-sector employees.

Pavlovich had a difficult task, indeed. To go back 12 years and allocate the Respondent's expenses between the public sector and the private sector members. It would be difficult enough to determine a union's expenses 12 years earlier, but allocating expenses between two groups of employees is even more difficult. There could be little certainty and definitiveness in this determination; it would, of necessity, have to be an approximation. I believe that Pavlovich was reasonable and fair in his allocations and determination. At the time, McGowan represented about 17 public sector units and 10 or 11 private sector units. He was occasionally assisted by Wolt, who was learning the Respondent's operation from McGowan and other of Respondent's agents. Allocating all of McGowan's salary to the public-sector unit was a fair determination, as were Pavlovich's other allocations, including the 83 percent, 17-percent split when no more definitive allocation could be decided. I therefore find, as defended by the Respondent, that there was no net cost to the Respondent of representing these public-sector employees, in other words, it was "a wash," and therefore there was no charge to the Schreiber unit employees, including the dissenters, in representing them.

CONCLUSION OF LAW

Pursuant to the Board's remand, I find that Respondent did not violate Section 8(b)(1)(A) and (2) of the Act as set forth in the Board's remand.

[Recommended Order omitted from publication.]